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{SHOW } PROCEEDINGS AND ORDERS DATE: 030685

CASE NBR 84-1-00532 CFX
SHORT TITLE Rowland, Marjorie H. DOCKETED: Oct 2 1984
VERSUS Mad River Local Sch. Dist.

Date	Proceedings and Orders
Oct 2 1984	Petition for writ of certiorari filed.
Oct 29 1984	Order extending time to file response to petition until December 5, 1984.
Dec 5 1984	DISTRIBUTED. January 4, 1985
Dec 6 1984	Brief of respondent Mad River Local Sch. Dist. in opposition filed.
Aug 24 1984	Application for extension of time to file petition for writ of certiorari filed, and order granting same
Aug 24 1984	until Oct. 2, 1984, by O'Connor, J., Aug. 27, 1984.
Jan 4 1984	Reply brief of petitioner Marjorie H. Rowland filed.
Jan 7 1985	REDISTRIBUTED. January 11, 1985
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Date	Proceedings and Orders
Feb 25 1985	Petition DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.) Justice Powell OUT.

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84-582 (1)

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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARJORIE H. ROWLAND,

Petitioner,

v.

MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO, A PUBLIC BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. QUESTIONS PRESENTED

A. Did the petitioner's statements to school personnel that she is homosexual constitute speech on a matter of public concern?

B. Did the Court of Appeals fail to apply the "clearly erroneous" rule in reversing the jury's factual finding that key decision-makers of the respondent school district treated petitioner differently than similarly situated employees because she was homosexual or bisexual?

C. Can there be a finding of unlawful discrimination based on direct evidence of discriminatory motive?

D. Does suspending, transferring, and nonrenewing a school guidance counselor because she is homosexual violate the Equal Protection clause of the Fourteenth Amendment to the Constitution?

E. Did the Court of Appeals incorrectly apply the "but for" standard of *Mount Healthy v. Doyle?*

F. Is the respondent school district liable for unconstitutional acts committed by key decision-makers who were in the process of carrying out official policies of respondent?

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II. GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

A. Opinion Below

The opinion of the Sixth Circuit Court of Appeals from which review is sought is reported, 730 F.2d 444 (6th Cir. 1984), and appears in the appendix to this Petition at A.-1a.

B. Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Petitioner seeks review of a decision of the Sixth Circuit Court of Appeals, reversing the jury verdict and damages awarded petitioner in the trial of this matter, rendered on March 22, 1984 (A.-1a). A Request for Rehearing With A Suggestion for a Rehearing *en banc* was denied by the Sixth Circuit Court of Appeals on June 4, 1984 (A.-30a). The Decision of the United States District Court for the Southern District of Ohio, Western Division, based upon the jury's verdicts finding in favor of plaintiff was filed on October 22, 1981 (A.-31a).

C. Constitutional provisions and statutes involved in this case.

United States Constitution, First Amendment (A.-52a).

United States Constitution, Fourteenth Amendment (A.-52a).

42 U.S.C. §1983 (A.-52a-53a).
28 U.S.C. §1343 (A.-52a).

III. STATEMENT OF THE CASE

This case was brought pursuant to 28 U.S.C. §1343 to protect rights guaranteed by U.S.C. §1983 and the First and Fourteenth Amendments to the United States Constitution.

The plaintiff-petitioner, Marjorie Rowland (hereinafter petitioner), began working as a vocational guidance counselor at Stebbins High School in the defendant-respondent

Mad River Local School District (hereinafter respondent) in August, 1974 under a limited one-year contract (Tr.II, 62-64, 289-290). In late November she informed her secretary, Elaine Monell, of her bisexual orientation[1] (Tr.II, 320-321, 419). She also told several close friends on the faculty (Tr.II, 321-323). Petitioner merely expressed her sexual preference. There is no evidence that she made "improper advances" toward other employees or students or that she "imposed herself" upon anyone. During this same time period, petitioner told the same secretary that two of the students she was counseling were homosexual (Tr.II, 310-318).

Following an emotional meeting with the mother of one of the homosexual students, during which petitioner's encouragement of the parent to accept the student's homosexuality was met with open hostility and accusation, petitioner discussed the situation with Assistant Principal Goheen (Tr.II, 30, 329-331, 452-453, 511). At this meeting petitioner disclosed her own sexual orientation.

In December, petitioner met with the school principal, DiNino, who indicated he had become aware of the aforementioned events, and asked petitioner to resign (Tr.II, 69-71, 336-338; Tr.III, 495-496, 517-518). Petitioner refused to resign, subsequently informing other teachers including union representatives of her sexual orientation in an effort to seek their support (Tr.II, 338-350; Tr.III, 540).

DiNino then reported his conversations to Dr. Hopper, District Superintendent, who in turn informed the School Board that there was a guidance counselor who had informed other staff members of her sexual orientation. When petitioner refused to resign, she was immediately suspended (Tr.II, 110, 344), and the Board was subse-

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[1]The fact that Mrs. Rowland disclosed her bisexuality was essentially viewed by school authorities as a statement that she was homosexual.

quently informed of this action (Tr.II, 210-213, 222-223; Tr.III, 8-10, 638-639).

Petitioner filed the first of two actions alleging constitutional violations for the suspension in District Court and was granted an injunction requiring the School District to reinstate petitioner to an area commensurate with her certification. When forced to end her suspension, Hopper assigned her to a newly created position outside the high school building, permitted her no student contact, and instructed her to develop a career education curriculum (Tr.II, 184-185; Tr.III, 642-643).

In March, 1975, Hopper concurred with DiNino's recommendation not to renew petitioner's contract (Tr.III, 514, 528; Tr.II, 230). Hopper recommended to the Board that petitioner's contract not be renewed and the Board unanimously voted to not renew the contract at a regular Board session (Tr.II, 69-97, 217-218; Tr.III, 14). At the time of DiNino's and Hopper's decisions this matter had received press coverage and petitioner had spoken publicly concerning the school district's actions. Organized parental pressures were also involved in the ultimate decision to nonrenew her contract. *Rowland v. Mad River Local School District*, 730 F.2d 444, 453 (6th Cir. 1984) (Edwards, J., dissenting).

Petitioner then filed a second action in District Court alleging denial of several constitutional rights in her nonrenewal. Several counts of the first action were dismissed by way of summary judgment and the remaining causes of action in the two cases were consolidated. On August 17, 1977, the District Court acting *sua sponte* dismissed all remaining claims on the basis that sexual orientation is not constitutionally protected and thus not the subject of an equal protection challenge. On January 2, 1980, the Sixth Circuit Court of Appeals vacated the District Court's Order and remanded the case to the

District Court for "development of the circumstances surrounding the decision of defendants."

A trial was held and a southwestern Ohio jury determined that respondent's actions violated petitioner's rights of free speech under the First Amendment and equal protection under the Fourteenth Amendment. On the basis of a series of special verdicts, the Magistrate entered an order finding liability on the part of the School Board. The jury found that petitioner's statements regarding her sexual orientation in no way interfered with her duties, the duties of the people she told, or the operation of the school (Special Verdicts I, II, and III). (A-22a-27a). In Special Verdict V the jury found that petitioner was treated differently than similarly situated employees due to her status as a homosexual. (A-28a). The jury also found that there was one area in which Mrs. Rowland was not performing her duties as a guidance counselor in a satisfactory manner. (Special Verdict V, VHI, A-28a-31a). The jury found that petitioner should not have revealed the sexual orientation of two of her students to her secretary because it was unnecessary.[2] However, the jury determined this was not sufficient to warrant termination since they held that if Mrs. Rowland had not been bisexual nor revealed her homosexuality to others, she would not have been fired (Special Verdict VIII, A-31a). The jury subsequently awarded plaintiff damages totalling $55,973.14 (Judgment on November 20, 1981).

IV. ARGUMENT

A. Did The Petitioner's Statements To School Personnel That She Is Homosexual Constitute Speech On A Matter Of Public Concern?

The petitioner's revelation of her sexual orientation to

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[2]This finding is reflected in Special Verdict V(9), which can be found following Special Verdict VIII(6).

her secretary and later to the assistant principal and other teachers was speech. The petitioner was suspended, transferred and ultimately nonrenewed because of the revelations that she was homosexual. However, despite evidence in the record to the contrary, the Sixth Circuit Court of Appeals, following an erroneous reading of *Connick v. Myers*, _____ U.S. _____, 103 S.Ct. 1684 (1983), held that this speech was unprotected because it did not involve a matter of public concern.

The majority of the appellate panel reasoned that Mrs. Rowland initially spoke to her secretary and the assistant principal of the high school (Thomas Goheen) in what it assumed were confidential situations. The majority considered that later conversations were efforts to enlist the aid of others to permit petitioner to remain as a guidance counselor at the high school. This analysis is inconsistent with holdings of this Court and should be overturned. The ruling of the majority of the panel in this case makes it virtually impossible to show that any statements that are made in private by a public employee are entitled to First Amendment protection.

This Court laid down the test for determining what constitutes a violation of the First Amendment to the Constitution in *Pickering v. Board of Education*, 391 U.S. 563 (1968). This Court held in *Pickering* that a court must balance the interests of the employee as a citizen in commenting upon matters of public concern against the interests of the state, as an employer, in promoting the efficiency of the public services. *Id.*, at 568. Thus, the state's interests outweigh the employee's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. *Childers v. Ind. Sch. Dist. No. 1 of Bryan County*, 676 F.2d 1338 (10th Cir. 1982).

This Court recently held that courts must undertake an initial inquiry before utilizing the *Pickering* balancing

test. *Connick v. Myers, supra.* The Court held in *Connick,* which was decided after the Magistrate's decision in the instant case, that the district court should not engage in a balancing test unless the speech addresses a matter of public rather than private concern and that matters of merely personal interest are not protected by the First Amendment. In the case at bar, the Sixth Circuit Court of Appeals narrowed the purview of the First Amendment by holding that the petitioner's statements regarding her homosexuality and bisexuality were not matters of public concern; that they were only statements made in the petitioner's personal interest and therefore rendered the *Pickering* balancing approach inapplicable.

The critical analysis of whether Mrs. Rowland's statements related to a matter of public as opposed to private concern is a question of law rather than fact. *Connick v. Myers, supra,* at 1690, n. 7. Consequently, this question must be resolved by referring to tests set forth by this Court and by the *Pickering* progeny, which were cited with approval in *Connick.* The Court in *Connick* provided several guideposts to aid in the determination of the complex question of what is a matter of public concern.

This Court held in *Connick* that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement as revealed by the whole record." *Id.,* at 1690. The majority of the panel in the case at bar, by initially concentrating on the fact that the petitioner's statements occurred in private, placed undue weight on the context of the statements. The majority totally ignored this Court's decision in *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), which was carefully distinguished by the Court in *Connick, supra,* at 1691, n. 8.

When *Connick* and *Givhan* are read in conjunction, it is apparent that this Court recognized that there are two

classes of speech of public concern: statements of public import because of their content, form and context; and statements that, by virtue of their subject matter, are *inherently* of public concern. *Connick v. Myers, supra*, at 1691, n. 8. *See also, Id.*, at 1696-1697, Brennan, J., dissenting. The case at bar falls into the latter category.

In *Givhan*, this Court held that public employees are protected by the First Amendment when they communicate privately with their employers. Ms. Givhan's statements concerning the school district's allegedly racially discriminatory policies involved a matter of public concern. Therefore, even though the context of the statement was private, the content was inherently of a public nature.

Likewise, the petitioner's announcement of her homosexuality in the instant case involves an issue of inherent public concern. Homosexuals are struggling for recognition and equality just as racial minorities are. Judge Edwards in his dissenting opinion in the case at bar thoughtfully pointed out that careful studies of homosexuality have established two facts of which the courts should take judicial notice: the extent of homosexuality in this country and that homosexuality is no longer classified as a mental disease. *Rowland v. Mad River Local School District, supra* at 454-455 (Edwards, J., dissenting). Whether or not she meant it to be, Mrs. Rowland's speech revealed her membership in a minority group, one which is gradually gaining acceptance within our society. The petitioner's statements can be characterized as a protest against those who believe that homosexuals should remain in the "closet" and should not reveal their sexual orientation.

It is also important to note that one other factor often associated with the context portion of the speech analysis is not present in the case at bar. Unlike many of the cases referred to in *Connick* as the *Pickering* progeny, this case does not involve speech motivated by any ongoing employment dispute. *Cf. Wilson v. City of Littleton, Colorado*, 732

F.2d 765 (10th Cir. 1984) and *Brown v. Department of Transportation, F.A.A.*, 735 F.2d 543 (Fed. Cir. 1984). The petitioner's expression was not in response to any employment directive. The speech by itself did not challenge any established lines of authority. Instead, it involved a "matter of social concern to the community." *Connick, supra,* at 1690.

Even if Mrs. Rowland's speech did not fall within the *inherent* public importance category, it is protected under *Connick.* As this Court held, if the speech is not a matter of *inherent* public importance, the courts by analyzing content, form and context of the speech may determine whether it involves a matter of public concern. Also relevant to such an analysis is the manner, time, and place of the speech. *Id.*, at 1693.

In *Connick,* an assistant prosecutor was terminated because of a questionnaire she circulated soliciting opinions from co-workers on a variety of employment issues, including policies within the office. This questionnaire was motivated by and followed a dispute that Ms. Myers was having with her supervisor concerning an internal transfer. This Court believed that, except for the one question relating to political campaigns, Myer's questionnaire, while relating to an agency's performance, did not sufficiently raise an issue which would be helpful to the public in evaluating the conduct of government. The questionnaire was therefore not a matter of public concern. This Court was persuaded by the fact that if the questionnaire were released to the public, it would convey no information other than that one employee was upset with the status quo. The questions were not to evaluate office performance but to gain ammunition for another round in the employment dispute. *Connick, supra,* at 1691.

In the case at bar, the petitioner's statements did not involve merely private concerns. They were aimed at social and legal change, which are at the core of the First

Amendment protection.

Mrs. Rowland revealed that she was bisexual to Assistant Principal Goheen in the context of discussions regarding two homosexual students and their parents' inability to cope with the students' sexual orientation. The petitioner was discussing a matter of school, as well as public concern. Judge Edwards recognized the public nature of the speech and refuted the majority's contention that there was no evidence to support that this was speech of public concern. He stated in his dissenting opinion that:

> While, for all this record shows, her first disclosure to the secretary may have been intended to be confidential, plaintiff's later statements were clearly a part of an effort to establish her right to her job while admitting being bisexual. Long before her nonrenewal/discharge, plaintiff became a center of public controversy in the Mad River School community involving the same issue of homosexual rights which has swirled nationwide for many years. This record leaves no doubt but that her statements about her status resulted in 'public concern'—both pro and con.
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> * * *
>
> To summarize the first amendment aspect of this case, the speech may not have had its origin in an overt attempt to exercise freedom of speech. But speech it was. It revealed plaintiff's status as a homosexual in what at the outset she may have presumed to be a confidential relationship. When, however, that speech was spread to school authorities and the community, plaintiff's adherence to her right both to be what she was and to state the fact brought down on her head the wrath of some parents and termination of her job by the ruling authorities of her school. There is evidence in this record that organized parental pressures were involved in the ultimate nonrenewal/discharge. Clearly at the point of discharge, there was a controversy in process over an important public issue. [Citations and quotation omitted.]

730 F.2d 444, 452-453

School officials tried to remove the petitioner from the school as soon as they learned that she was homosexual. The school administrators believed that the community would be offended by a homosexual guidance counselor. They *feared* public reaction. Thus, the matters concerning Mrs. Rowland's suspension and nonrenewal were matters of public concern and controversy.

The petitioner's situation is similar to that of the respondent in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, a teacher was not rehired because he conveyed to a radio station the substance of a memorandum that the principal had circulated relating to teacher dress and appearance. Although it might initially appear that the issue of one's dress would not be a matter of public concern, this Court held that the fact that there was public debate surrounding the issue elevated it to a matter of public concern. The same is true about homosexuality; it is a matter that is hotly debated by our society and was debated by the people in the Mad River area prior to the petitioner's nonrenewal.

This Court should consider the recent decision of *National Gay Task Force v. Board of Education of the City of Oklahoma City, State of Oklahoma*, 729 F.2d 1270 (10th Cir. 1984), in which the Court struck down as violating the First Amendment an Oklahoma state statute which proscribed several types of homosexual activity, including "advocating, soliciting, imposing, encouraging, or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." *Id.*, at 1272. The Court utilized the *Pickering* balancing test and found that "advocacy" of homosexual activity rarely created a substantial disruption of school activities.

The majority of the panel in the case at bar was overly restrictive in characterizing the petitioner's speech as a matter of private concern. It is imperative that this Court

grant *certiorari* to provide guidelines on what constitutes matters of public concern so that lower courts, such as the Sixth Circuit Court of Appeals, will not expand exceptions to the First Amendment.

B. Did The Court Of Appeals Fail To Apply The "Clearly Erroneous" Rule In Reversing The Jury's Factual Finding That Key Decision-makers Of The Respondent School District Treated Petitioner Differently Than Similarly Situated Employees Because She Was Homosexual Or Bisexual?

This Court has consistently enunciated the rule that the power of review by federal appellate courts is limited. This Court has held that appellate courts are "restricted to considerations of law," [*Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, _____ U.S. _____, 102 S.Ct. 2858, 2879 n.39 (1982)], and may not overturn factual findings unless they are "clearly erroneous". *Pullman-Standard v. Swint*, _____ U.S. _____, 102 S.Ct. 1781, 1789 (1982). This Court in *Swint*, *supra*, emphasized that "'fact finding is the basic responsibility of district courts, rather than appellate courts . . .'" and that in order for an appellate court to set aside factual findings it must *properly apply* the F.R.Civ.P. 52 requirement that the findings be *clearly erroneous*. *Id.*, at 1791. This Court in effect vacated the appellate court's decision in *Swint*, because the Court of Appeals *disagreed* with the decision of the district court that the plaintiffs had not proved intent to discriminate in employment opportunities. The Court of Appeals stated in *Swint* that "[a]n analysis of the . . . facts . . . leaves us with the definite and firm conviction that a mistake has been made," [*Swint v. Pullman-Standard*, 624 F.2d 525, 533 (5th Cir. 1980), *rev.*, _____ U.S. _____, 102 S.Ct. 1781 (1982)]. Numerous courts, including this Court, have held that the use of such language as "the firm conviction that a mistake has been made" is the same as saying that a finding is "clearly erroneous". *See, United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This Court held in

Swint, supra, that although the appellate court used such language, it did not properly apply the "clearly erroneous" rule. The appellate court's view of the facts was *different* than that of the district court; there was no showing that the district court's factual findings were clearly erroneous.

This Court's opinion in *Swint* requires this Court to overturn the Court of Appeal's factual finding that there was no showing that petitioner was treated differently because she is homosexual or bisexual. A majority of the panel of the Court of Appeals has overstepped the boundaries of legitimate appellate review.

The majority of the panel of the Sixth Circuit Court of Appeals in the case at bar stated that:

> [t]here was absolutely no evidence to support the finding that Mrs. Rowland was treated differently from other similarly situated employees. There was no evidence of how other employees with different sexual preferences were treated.

Rowland v. Mad River Local School District, supra, at 450. The majority of the Court of Appeals noted that the Magistrate in a discussion with counsel had asserted that there was no evidence on similarly situated employees and stated that it "was plain error" for the Magistrate to require the jury "to make findings on an issue which he recognized as having been the subject of no proof. . . . Since plaintiff failed to produce any proof that she was treated differently from other similarly situated employees there was nothing to submit to the jury on this issue." *Id.*

The majority of the panel of the Court of Appeals concluded its decision by stating that:

> the plaintiff sought to prevail on her equal protection claim without any showing that heterosexual school employees in situations similar to hers have been, or would be, treated differently for making their personal sexual preferences the topic of comment and discussion in the high school community.

Id., at 451-452.

The majority of the appellate panel in the case at bar used language ("plain error") that is often applied to a "clearly erroneous" review of a district court's opinion, just as the Court of Appeals in *Swint* did. Nevertheless, like the Fifth Circuit Court of Appeals in *Swint*, the majority of the panel in the instant case did not apply a "clearly erroneous" analysis of the evidence—it did not attempt to determine whether the jury's factual findings were "clearly erroneous" in light of the totality of the evidence. The Court did not even refer to any of the abundant evidence, much of which is uncontradicted, that the petitioner was suspended, transferred, and nonrenewed because she was homosexual.

Judge Edwards concluded in his dissenting opinion that the evidence amply supported the jury's finding. He stated:

> She was bisexual by preference. She said so. She was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason. See Special Verdict VIII(5), Appendix A.

Id., Edwards, J., dissenting, at 454.

Judge Edwards used the analogy of a teacher who appeared to be white and whose contract was nonrenewed after disclosing to her secretary that one of her parents was black. Judge Edwards stated that the petitioner in the case at bar is entitled to the safeguards of the Equal Protection Clause of the Fourteenth Amendment for being nonrenewed after revealing that she is homosexual, just as is the teacher who is nonrenewed for revealing that one of her parents is black.

There is abundant evidence in the case at bar that the petitioner was suspended, transferred, and nonrenewed because she was homosexual; in other words, that she was treated differently than heterosexual employees. The existence of such evidence shows that the majority of the panel of the Court of Appeals could not have applied the "clearly erroneous" standard.

Larry Smith, the attorney for the respondent School board, who told the petitioner that she was being suspended, testified that Raymond Hopper, the superintendent of the respondent, told him that he had "a problem with a guidance counselor who had told other employees that she was a lesbian." (Tr.II, 101, A.-54a). Mr. Hopper told Mr. Smith that he wanted to take action against the petitioner "because she was telling employees that she was a lesbian." (Tr.II, 101-102, 104-105, A-54a-57a). Mr. Smith later testified that he told the petitioner and others that the petitioner was being suspended in December, 1974, because she was telling "female staff members that she was homosexual." (Tr.II, 110, A-57a).

Dr. Hopper testified that Larry Smith, who was speaking on behalf of the School Board and him, told the petitioner that he wanted her to resign because she had revealed her bisexuality. (T.III, 632-633, A-57a-58a).

Mr. DiNino, the principal of the high school in which the petitioner was a guidance counselor, testified that he understood that the petitioner was suspended "because of the revelation of her homosexuality and the disruption in the school" caused by people becoming aware of her homosexuality. (Tr.II, 76, A.-60a). Mr. DiNino later in the trial testified that he did not believe that the petitioner could be an effective guidance counselor because of people's adverse views on homosexuals. (Tr.III, 560-561, A-58a).

The petitioner testified that Mr. DiNino, the principal, told her that he was going to take some action against her because the "combination of my being bisexual and a counselor could not work at Stebbins [High School]" (Tr.II, 337). On cross-examination, the petitioner stated that it was Mr. DiNino's "estimation that it wasn't appropriate for me to be bisexual and working as a guidance counselor at Stebbins." (Tr.II, 441, A-60a).

Respondent transferred the petitioner to a position in which she had no contact with students and nonrenewed

her contract for the same reasons as it suspended her; it was uncontradicted that the petitioner engaged in no acts after the suspension that could cause the transfer or the nonrenewal.

The entire transcript of the testimony, like the excerpts quoted above, is replete with statements that officials of the respondent (principal, superintendent, and attorney) were concerned about the fact that the petitioner was homosexual and that others knew of her homosexuality; that they (wrongly, as the jury held) believed that the petitioner might cause problems because of her homosexuality. All of the testimony showed that the respondent wanted the petitioner removed because she was homosexual and others knew about it.

The majority of the appellate panel could not have used the "clearly erroneous" standard and have concluded that there was no evidence in the case at bar that the petitioner was treated differently than other employees because she was homosexual. Furthermore, the appellate panel could not have used the "clearly erroneous" standard and have concluded that it was "plain error" for the Magistrate to let the jury decide whether the petitioner was discriminated against because she was homosexual. The petitioner testified that the principal told her that he wanted her removed because she was homosexual; the principal testified that he wanted her removed because others might be concerned because she was homosexual.

There was no evidence at trial that respondent wanted to remove the petitioner because she had talked about sexual orientation in general. Respondent's officials did not say that they were concerned about the fact that she was revealing *personal information about her love life*, but that she was *homosexual* and that she was revealing her *homosexuality*. It would be difficult for anyone who reads the record in this case to believe that any heterosexual would have been suspended or nonrenewed by respondent

for telling a co-worker that he or she was married, or dated or was in love with a person of the opposite sex. The petitioner testified that it was common practice for employees of the respondent to talk with co-workers about their spouses, girlfriends and boyfriends. (Tr.II, 333, A-60a). Such conversations did not bother the respondent.

Respondent was only concerned about the petitioner's homosexuality and said so. As Judge Edwards stated in his dissent, the petitioner "was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason." *Rowland v. Mad River Local School District*, *supra*, at 454. It is puzzling how findings of the jury could be *clearly erroneous* when one of the three members of the appellate panel was convinced from looking at the record that the petitioner was discharged because she was homosexual.

C. Can There Be A Finding Of Unlawful Discrimination Based On Direct Evidence Of Discriminatory Motive?

A majority of the panel of the Court of Appeals stated that there was no "showing that heterosexual school employees in situations similar to hers have been, or would be, treated differently for making their personal sexual preferences the topic of comment and discussion in the high school community." *Rowland v. Mad River Local School District*, *supra*, at 452. The majority of the panel erred in holding that an equal protection analysis *requires* comparative evidence of how heterosexual and homosexual employees were treated by the respondent.

As this Court held in a case brought pursuant to 42 U.S.C. §2000e (Title VII of the 1964 Civil Rights Act), "the plaintiff may prove his case by direct or circumstantial evidence." *United States Postal Service Board of Governors v. Aikens*, _____ U.S. _____, 103 S.Ct. 1478, 1481 n.3 (1983). Plaintiffs may in cases involving the loss of constitutional or statutory civil rights present a circumstantial case

of discrimination by presenting comparative evidence. This Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), established the standard of proof for circumstantial cases of discrimination under Title VII. The same principle applies in cases brought under the Fourteenth Amendment to the Constitution. *See, Grano v. Columbus Department of Development*, 637 F.2d 1073, 1080 (6th Cir. 1980).

A plaintiff proves a *prima facie* case of discriminatory discharge by showing that the plaintiff is a member of the protected group, that he or she was discharged, that he or she was qualified for the position, and that the position remained open for other candidates. *McDonnell Douglas Corp. v. Green, supra.* The defendant may rebut a plaintiff's prima facie case by articulating a legitimate reason.

The plaintiff can then prevail by showing that the articulated reason is pretextual. As this Court held in *McDonnell Douglas Corp. v. Green*, "especially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired." *Id.* at 804. An important aspect of a circumstantial case of employment discrimination is the showing that the plaintiff was treated differently than persons in non-protected groups. This and other courts have emphasized that one need not present direct evidence of discriminatory motive; one can prove a case circumstantially. *Id.*

What is equally important is that one does not have to prove a case through circumstantial evidence; one can present direct evidence of discriminatory motive. A majority of the panel in the case at bar lost sight of this rule of law when it held that the petitioner presented no evidence of heterosexual employees who announced their sexual preference and were retained; for instance, that heterosexual employees stated to co-workers that they were married or dated someone of the opposite sex and were not fired.

Petitioner, instead of presenting circumstantial evidence, presented direct evidence of discriminatory motive—for instance, the petitioner's testimony that the school principal said he wanted to remove her from her position because she was homosexual; the principal's testimony that he was concerned with having a homosexual guidance counselor in the school; and the testimony of the School District's attorney and the superintendent that they wanted the petitioner removed from the school because she had told co-workers she was homosexual. The petitioner proved a *direct* case of discrimination. There should have been no need for the petitioner to present a circumstantial case (that is, evidence of how heterosexual employees were treated), because officials of the respondent admitted they wanted to remove the petitioner from her position because she was homosexual.

The petitioner's situation is no different than that of a white employee who is discharged immediately after informing the employer that his girlfriend is black or after the employer made the statement that an employee who dated a black woman would not be retained. It could not be seriously argued that the discharged white employee would have to present evidence that white employees who dated whites were treated differently. The discharged white employee in this example has proved a direct case of racial discrimination, as the employer has admitted the basis for its action. *See, Rowland v. Mad River Local School District, supra,* Edwards, J., dissenting at 453. Similarly, an employee who is discharged after revealing to her employer that she is pregnant does not have to present evidence that male employees are treated differently. *See, Cleveland Board of Education v. LaFleur,* 414 U.S. 632,639-640, particularly n.8 (1974), and *Jacobs v. Martin Sweets Co., Inc.,* 550 F.2d 364, 370 (6th Cir.), *cert. denied,* 431 U.S. 917 (1977).

The Court of Appeals, by not allowing the petitioner to prove discrimination by direct evidence, has in effect over-

turned a substantial body of law established by this Court. The rule in the case at bar, if allowed to stand, could make it difficult, or even impossible, to prove discrimination in cases in which there is substantial direct evidence of discriminatory motive but little comparative or circumstantial evidence.

This Court should grant *certiorari* in the instant case to reaffirm the doctrine that plaintiffs may prove discrimination by direct evidence and to prevent lower courts from requiring comparative or other types of circumstantial evidence when there is direct evidence of discrimination.

D. Does Suspending, Transferring, And Nonrenewing A School Guidance Counselor Because She Is Homosexual Violate The Equal Protection Clause Of The Fourteenth Amendment To The Constitution?

A majority of the panel that decided the instant case in effect prevented the petitioner from vindicating her rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The panel, by stating that the petitioner had not presented any evidence that she was treated differently than similarly situated employees, may have decided the case in that way so that it would not have to decide the issue of whether homosexuals are protected by the Fourteenth Amendment. This Court should grant *certiorari* to decide definitively this important issue.

As Judge Edwards stated in his dissent, there is "no reason to deny plaintiff her rights under the equal protection clause of [the Fourteenth A]mendment." *Rowland v. Mad River Local School District, supra,* at 453.

All federal appellate courts that have decided the issue have held that homosexuals are entitled to Fourteenth Amendment protection. Federal courts have held that a person can not be discharged by a public agency for being homosexual unless the agency can show that the person's homosexuality disrupted the work place, interfered with

efficiency or "bears a substantial relationship to an important government interest." *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1382 (9th Cir. 1981), *cert. denied* 454 U.S. 864 (1981); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976); and *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980). Other courts have held that being homosexual is within the right of privacy and that a state can only prohibit homosexual behavior if there is a compelling state interest. *See, Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981); and *Gay Law Student Association v. Pacific Telephone and Telegraph Co.*, 24 Cal.3d 458, 156 Cal. Reptr. 14, 595 P.2d 592 (1979).

This Court has in a number of cases extended the right of privacy to the possession of pornographic materials [*Stanley v. Georgia*, 394 U.S. 557 (1969)]; the right of married couples to choose whether to use contraceptives [*Griswold v. Connecticut*, 381 U.S. 479 (1965)]; the right of unmarried people to receive contraceptives [*Eisenstadt v. Baird*, 405 U.S. 438 (1972)]; the right of a woman to choose to have or not to have an abortion [*Roe v. Wade*, 410 U.S. 113 (1973)]; and the right of minors to receive contraceptives [*Carey v. Population Services Intern.*, 431 U.S. 678 (1977)]. These cases do not just involve the marital right to privacy (see, *Eisenstadt v. Baird, supra*) nor relate to activities which comport with traditional morality (*Roe v. Wade, supra*, and *Eisenstadt v. Baird, supra*). This Court has defined the right of privacy to include even conduct which is condemned by the majority of our society, as in *Stanley v. Georgia, supra* (the right to view obscene materials in private).

There is a common thread that runs throughout this Court's privacy cases: that a citizen has "*the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.*" *Stanley v. Georgia, supra*, at 564 (emphasis added). As this Court

stated in *Stanley*, while quoting Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), the right to privacy includes "'*the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.*'" *Stanley v. Georgia*, *supra*, at 564 (emphasis added).

This Court has not decided the specific issues of whether the state may interfere with, one, the right of adults to engage in private consensual sexual activity, (*Carey v. Population Services Intern.*, *supra*, at 688 n.5 and 694 n.17), or, two, the right of adults to consensually engage in homosexual activity, although such rights are implicit in the language of this Court's privacy cases.

This Court had the opportunity to decide these issues when it granted *certiorari* to review a decision by the New York Court of Appeals that a statute that criminalized "deviate sexual intercourse between consenting adults" violated the First and Fourteenth Amendments to the Constitution. *New York v. Uplinger*, 58 N.Y.2d 936, 447 N.E.2d 62 (1983). This Court dismissed the writ of *certiorari* as improvidently granted. *New York v. Uplinger*, _____ U.S. _____, 104 S.Ct. 2332 (1984). The Court has the opportunity in this case to decide the protection to be afforded homosexuals, an issue that has spawned a considerable amount of discussion and debate. *See*, *Rowland v. Mad River Local School District*, *supra*, Edwards, J., dissenting, at 455; K. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980); D. Bazelon, *Probing Privacy*, 12 Gonzaga L.Rev. 587 (1977); and D. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957 (1979).

The case at bar is different from a number of the cases that have considered the rights of homosexuals, as this case involves status, rather than conduct. It therefore more closely affects the personal right of privacy, which

makes this case a proper vehicle for the Court to enunciate whether the status of homosexuality is protected by the right to privacy and the Fourteenth Amendment to the Constitution. The petitioner herein was suspended, transferred, and nonrenewed, not because she had engaged in any homosexual activity, but because she was homosexual. Respondent discriminated against the petitioner because of her status of homosexuality—because of the way that she was rather than what she did. *See, benShalom v. Secretary of the Army, supra,* at 975-976.

The equal protection analysis is supported by the statement of Judge Edwards in his dissent in the case at bar and by the trial testimony of Dr. Jacobsen, a psychiatrist, that homosexuality is not considered a mental disorder. *Rowland v. Mad River Local School District, supra,* Edwards, J., dissenting, at 454. Dr. Jacobsen also testified that studies have shown that a person's homosexuality does not affect his or her job performance. Tr.III, 127. Therefore, there is no reason to treat homosexual employees differently than heterosexual employees.

Furthermore, as Judge Edwards noted and Dr. Jacobsen testified, studies have shown that homosexuality is widespread in the United States—that the incidence of exclusive homosexuality may be between 5% and 10% and that up to 37% of males have had some homosexual experiences. *Id.*, at 455. As Dr. Jacobsen testified, homosexuality is a status that can not be changed after early childhood (Tr.III, 126). Homosexuals, like every other segment of our society, are entitled to be left alone from the undue interference of governmental intrusion.

As homosexuality is included within the right of privacy, it is a fundamental right and, under traditional equal protection analysis, may not be infringed unless there is a compelling state interest.

A unanimous jury in the case at bar decided that key decision-makers of respondent suspended, transferred, and

nonrenewed the petitioner because she was homosexual. The jury also concluded that the petitioner's telling co-workers that she was homosexual did not in any way interfere with the proper performance of her duties, the proper performance of the duties of those to whom she told she was homosexual, or interfere with the operation of the school. (Special Verdicts Nos. I-III, A-22a-27a).

The traditional equal protection analysis places the burden on the employer to show that its actions were justifiable. However, the Magistrate in the instant case put the burden on the petitioner to show that her statements about her homosexuality did not interfere with her work performance—he instructed that if the jury found that the petitioner's statements about her homosexuality did not interfere with her work, it had to do so by a preponderance of the evidence. Thus, the petitioner was required not only to prove that there was a violation of equal protection, but also that her homosexuality did not adversely affect her work performance.

In the instant case it does not make any difference which equal protection analysis one uses: the compelling state interest, the interference with job performance, or the legitimacy of government interest in removing the petitioner. The respondent has not shown that it had any justification whatsoever for its actions—petitioner's homosexuality did not *in any way* interfere with her work performance. That the jury was asked the question of whether the *revelation* of the petitioner's homosexuality affected her work performance does not harm the equal protection analysis. Coworkers could only become aware of the petitioner's homosexuality, and thereby affected by it, through the petitioner's telling them that she was homosexual.

This case is markedly different from other cases involving the rights of homosexuals because there was a jury trial. A jury in southwest Ohio, the heartland of America, has decided that the respondent school district discrimi-

nated against Mrs. Rowland because of her homosexuality and for revealing to others that she was homosexual. The jury also decided unanimously that the petitioner would not have been suspended, transferred, or nonrenewed if she were not homosexual, and that saying she was homosexual did not in any way interfere with her work performance. The jury's verdicts are particularly remarkable because some judges have stated, in the absence of facts and in the absence of asking people what their attitude would be about having a homosexual employee, that homosexuality could adversely affect work performance. The jury in the case at bar was asked all the right questions and decided that a homosexual guidance counselor could be and was as effective as a heterosexual guidance counselor.

E. Did The Court Of Appeals Incorrectly Apply The "But For" Standard Of Mount Healthy v. Doyle?

In *Mt. Healthy City School District Board of Edcuation v. Doyle*, 429 U.S. 274 (1977), this Court established the procedure governing a case involving termination of employment that derives from the exercise of First and Fourteenth Amendment rights. Under the *Mt. Healthy* standard, petitioner Rowland was required to and did successfully prove that 1) she engaged in constitutionally protected conduct, and 2) this conduct was a substantial or motivating factor in the decision to suspend, transfer and nonrenew her contract. Once petitioner proved this, the burden shifted to the School Board to show that the Board would have reached the same decision in the absence of the protected conduct. This Court's rationale for the "but for" test is that an employee who was terminated should not be placed in a better position than he or she would have been in the absence of the protected conduct. If there are other reasons to support termination, the fact that an individual engaged in constitutionally protected conduct should not save one's job.

Special Verdict VIII, in which the Magistrate used the *Mt. Healthy* standard, may be less exact than might be desired but it nonetheless satisfies that standard. Special Verdict VIII(5) could be read to combine two possible reasons for the Board's action: petitioner's sexual orientation and her statements concerning her sexual orientation. The jury answered that in the absence of these factors, petitioner's contract would have been renewed.

The majority is critical of this special verdict because it does not isolate the "impermissible reason". This distinction is overly artificial. If one concludes that the petitioner was suspended because she told others that she was homosexual, one would *have* to conclude that she was also suspended because of her homosexuality. Following the revelations, the respondent was concerned that petitioner was homosexual and that school employees knew about it and terminated petitioner's employment. There is no evidence that the School Board was aware of and tolerated petitioner's homosexuality before her revelations.

The majority of the panel asserted that the jury found that part of the petitioner's work performance was unsatisfactory but that the Magistrate did not instruct the jury in Special Verdict VIII(5) to answer whether she would have been suspended or nonrenewed for that reason. This is simply not so. The jury did answer in response to Special Verdict VIII(5) that Mrs. Rowland would not have been suspended or nonrenewed for some reasons other than being homosexual or revealing to others her sexual orientation. If the jury believed that the petitioner would have been suspended or nonrenewed because of unsatisfactory work performance, it would have answered Special Verdict VIII(5) in the positive.

The jury decided that the one facet of the petitioner's work performance that it believed was unsatisfactory would not have caused her discharge. Thus, the jury concluded that but for the petitioner's sexual orientation

and her revealing it to others, she would not have been suspended or nonrenewed.

It is clear from the foregoing that petitioner's job performance was fully considered by the jury and rejected as a basis for her suspension and nonrenewal. The opinion of the majority of the appellate panel is contrary to the law as set down by this Court in *Mt. Healthy* because it implies one must have an exemplary work record in order to prevail. Following this rationale, a less than perfect employee would not be able to overcome any reasonable employment problem erected by the employer as a pretext for the termination. This change from the "but for" test to one which allows a search for any reason whatsoever which, in the absence of the constitutionally protected conduct, could still somehow justify termination is impermissible. *Certiorari* should be granted in order to reaffirm this Court's holding in *Mt. Healthy*.

F. Is The Respondent School District Liable For Unconstitutional Acts Committed By Key Decision-Makers Who Were In The Process Of Carrying Out Officials Policies Of Respondent?

The Sixth Circuit has erroneously construed the standard for government liability under 42 U.S.C. §1983 for acts of policy-making officials as established by this Court in *Monnell v. New York City Department of Social Services*, 436 U.S. 658 (1978) and *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980).

There is no doubt that Dr. Hopper, as superintendent of the school district, was a policy-making official and acted with the approval of the Board of Education.

The Sixth Circuit ruled that it was not enough that Dr. Hopper, a policy-maker, had suspended the petitioner for impermissible reasons. Instead, the Court of Appeals construed this Court's precedent to mean that even the unconstitutional acts of a policy-making government official are not sufficient to hold the government liable unless

there is an enunciated policy which the official is executing or implementing. According to the majority of the panel in the case at bar, a key decision-maker would not be liable for unconstitutional acts, no matter how serious, unless the victim could show that the governmental body had an official policy of, for instance, getting rid of blacks, women, or homosexuals.

The Sixth Circuit held that the single discreet decision to suspend Mrs. Rowland did not constitute a policy or custom of removing homosexuals. However, this holding ignores the fact that Dr. Hopper, by virtue of his authority, established policy by his acts. The standard as enunciated by the Sixth Circuit would make it virtually impossible to hold a government entity liable for the unconstitutional acts of its policy-making officials. Officials would be able to terminate a number of employees because they are black, female, or homosexual and still not be liable for violating employees' constitutional rights, under the ruling of the majority of the panel. If this were the established law, there would be a question of how many persons would have to be discriminated against before a court would consider that there is a policy.

This holding by the Sixth Circuit is clearly contrary to this Court's holdings in *Monnell*, *supra*, and *Owen*, *supra*. In the *Owen* case, just as in the case before this Court, a decision-maker employee of the city (the city manager), acted in an unconstitutional manner in discharging an employee. This Court held that the city was liable for the single, unconstitutional act of the city manager in discharging the Chief of Police. The plaintiff was not required, as suggested by the Sixth Circuit, to demonstrate that the city manager or city council had a custom or policy of acting in an unconstitutional way, but only that the act was done by a key decision-maker and the act was unconstitutional. This Court held that holding the city liable for the unconstitutional acts of its decision-makers furthers the important

objectives of producing compensation to the victim and protecting the official from personal liability. *Owen v. City of Independence, Mo., supra.*

The Court of Appeals has taken on itself to limit this Court's ruling in *Monnell, supra* and *Owen, supra.* In so doing, the Sixth Circuit is at odds with all other circuit courts of appeals that have decided this issue. *See, Key v. Rutherford,* 645 F.2d 880, 882-883 (10th Cir. 1981); *Universal Amusement Co. v. Hofheinz,* 646 F.2d 996, 997 (5th Cir. 1981); *Kingsville Independent School District v. Cooper,* 611 F.2d 1109, 1112 (5th Cir. 1980); *Williams v. City of Valdosta,* 689 F.2d 964, 969 (11th Cir. 1982); and *Burt v. Abel,* 585 F.2d 613 (4th Cir. 1978). All of the above courts held that governmental bodies that entrust key decision-makers with certain responsibilities are liable for unconstitutional acts committed by the decision-makers. The body is liable, not because of *respondeat superior,* but because the body can act only through the officials. *See, Kingsville Independent School District v. Cooper, supra,* at 1112. The courts in all of these cases have relieved officials of personal liability but have subjected city governments to liability.

This Court should grant *certiorari* in order to bring the Sixth Circuit into conformity with the decisions of this Court and the other circuit courts of appeals.

V. CONCLUSION

Petitioner requests that for all of the above reasons the Petition for a Writ of *Certiorari* be granted and the case be set down for argument.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-3218

MARJORIE H. ROWLAND,

Petitioner,

v.

MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO, A PUBLIC BODY CORPORATE,

Defendant-Appellant

ROBERT L. BELL, *et al.*,

Defendants.

DECIDED AND FILED
United States Court of Appeals
Sixth Circuit
March 22, 1984

**ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

Before: Lively, Chief Circuit Judge; Edwards and Krupansky, Circuit Judges.

Lively, Chief Circuit Judge, delivered the opinion of the Court, in which Krupansky, Circuit Judge, concurred. Edwards, Circuit Judge, (pp. 15-23) delivered a separate dissenting opinion.

Lively, Chief Circuit Judge. The school district appeals from a judgment in favor of a non-tenured guidance counselor who was suspended, then transferred and finally not rehired at the end of her one-year appointment. The question presented is whether these actions deprived the plaintiff of her right to freedom of speech under the First Amendment or to equal protection of the law under the Fourteenth Amendment to the Constitution. We conclude that under the facts of this case neither constitutional deprivation occurred, and reverse the judgment of the district court.

I.

The plaintiff began working as a vocational guidance counselor at Stebbins High School in Yellow Springs, Ohio in August 1974 under a limited one-year contract. A short time later she told a secretary in an office she shared with other vocational education personnel that two of the students she was counseling were homosexual. During the same period in the fall of 1974 the plaintiff told the same secretary that she, the plaintiff, was bisexual and that she had a female lover. She also informed the assistant principal of the school and several teachers who were personal friends that she was bisexual. In December the plaintiff had a meeting with the principal of Stebbins, the defendant DiNino, and he suggested that she resign. The plaintiff refused to resign and then told several other Stebbins teachers that she had been asked to resign because she was bisexual, and sought their support. Following another meeting with DiNino, the defendant Hopper who was superintendent of the district, and the district's attorney, the plaintiff again refused to resign. Plaintiff's attorney also attended this meeting.

Following the second refusal to resign the plaintiff was suspended with full pay for the remainder of the contract year. She then filed the first of two actions in the district

court. When the district court entered a preliminary injunction against her suspension, plaintiff was reassigned to a position involving development of a career education curriculum. This was a position with no student contact. In March 1975 DiNino recommended that the contract of the plaintiff, along with those of several other Stebbins teachers, not be renewed. Superintendent Hopper concurred, and the plaintiff was informed of the recommendation. At a regular meeting of the school board the recommendation to not renew Rowland's contract was unanimously adopted without independent investigation. The plaintiff filed a second action in the district court charging that the reassignment and failure to renew her contract violated a number of her constitutional rights. The defendants in both action were the school district, the president and members of the board of the district, the superintendent of the district and the principal of Stebbins High.

II.

A.

In her first district court complaint the plaintiff set forth five causes of action. In the first of these she sought damages pursuant to 42 U.S.C. § 1983, claiming that the act of the defendants in suspending her without a hearing violated her right to due process under the Fourteenth Amendment. The district court granted summary judgment in favor of the defendants on this claim, on two claims attacking the constitutionality of several Ohio statutes and on a state claim brought under pendent jurisdiction. The plaintiff appealed to this court and we affirmed summary judgment for the defendants on all four claims in an unpublished order. The district court severed the fifth claim in the first action and consolidated it with the second action. In this severed and consolidated claim the plaintiff charged violation of her right of privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution in that she was suspended solely because she was bisexual. Thus, the suspension, transfer and nonrenewal

claims were all before the district court in the remaining action.

Thereafter the district court dimissed all claims, *sua sponte*, upon finding that sexual preference is not a constitutionally protected interest. On appeal this court noted that none of the circumstances surrounding the decision of the defendants to not renew Ms. Rowland's contract had been developed and concluded that dismissal on the pleadings was improper. In an unpublished order the judgment dismissing the complaint was vacated and the cause was remanded for further proceedings. Upon return to the district court the case was assigned to a United States Magistrate and the parties agreed to a jury trial before, and the entry of final judgment by, the magistrate.

B.

The magistrate determined to submit the issues, as he perceived them, to the jury in the form of a series of "special verdicts." Though all parties submitted extensive proposed instructions, the magistrate gave none of them, concluding that the alternative to special verdicts would be "a short course on the Constitution." In special verdicts 1 through 3 the jury found that neither plaintiff's disclosure to the secretary of her love for another woman, nor her statements to the assistant principal and to other teachers concerning her bisexuality interfered with the proper performance of anyone's duties or with the operation of the school generally. In the same verdicts the jury found that the decision to suspend the plaintiff was motivated at least in part by these statements regarding her bisexuality. In special verdict 4 the jury found that the decisions to transfer and to not renew her contract were not motivated even in part by the fact that plaintiff had filed a law suit regarding her suspension.

In special verdict 5 the jury found that in suspending and transferring her the defendants treated the plaintiff differ-

ently from similarly situated employees "because she was homosexual/bisexual." The jury also found that DiNino and Hopper treated her differently from similarly situated employees in recommending that plaintiff's contract not be renewed, but that the board of education did not treat her differently in voting not to renew Ms. Rowland's contract. In the same special verdict the jury found that at the time of her suspension the plaintiff was not performing as a vocational guidance counselor in a satisfactory manner "because she revealed to Mrs. Monell [the secretary] the sexual orientation of two students when it was not necessary to do so."

In special verdict 6 the jury found that defendants DiNino and Hopper acted in good faith in all their actions regarding plaintiff and in special verdict 7 that the board of education acted for no other reason than the recommendation of the defendant Hopper in voting not to renew Ms. Rowland's contract. In special verdict 8 the jury found that if plaintiff "had not been bisexual and if she had not told Mrs. Monell, the secretary, of her sexual preference," she would not have been suspended or transferred and the board of education would not have failed to renew her contract "anyway for other reasons."

C.

On the basis of the special verdicts the magistrate entered an order finding in favor of the school board members in their individual capacities, and in favor of the defendants DiNino and Hopper "on all issues in the complaint" because they acted in good faith. However, he found in favor of the plaintiff and against the school district for the suspension and transfer of plaintiff "in violation of her rights to equal protection of the law and free speech" and for nonrenewal of her contract "in violation of her right to free speech." The jury then awarded damages of $13,500 for personal humiliation, mental anguish and suffering

proximately caused by plaintiff's suspension, no damages for her transfer, and damages of $26,947 for loss of earnings proximately caused by nonrenewal of her contract. The jury found that plaintiff had suffered no loss of reputation or standing in the community and no personal humiliation, mental anguish or suffering as the result of the failure to renew her contract.

The magistrate found that the school district was liable for damages resulting from the plaintiff's suspension because the defendant Hopper was acting on behalf of the school district when he suspended her. Though Hopper was entitled to good faith immunity, the school district did not share this immunity, the magistrate held, because, Hopper was acting "within the sphere of his authority as a policymaker or decisionmaker." The magistrate held that special verdict 5, which found that the school board did not treat plaintiff differently from similarly situated employees because of her sexual preference in failing to renew her contract, determined that the school district did not violate Rowland's right to equal protection of the law by not renewing her contract. Nevertheless, he held the school district liable on the equal protection claim because of Hopper's action in suspending and transferring the plaintiff. He also construed special verdict 7, that the school board voted to not renew the contract solely on the basis of Hopper's recommendation, as a determination that plaintiff's right to freedom of speech was infringed by the nonrenewal action of the board.

III.

The district court awarded damages against the school district on two theories: (1) That the school district violated plaintiff's Fourteenth Amendment right to equal protection of the law by suspending her because she is bisexual or homosexual; and (2) That the school district violated plaintiff's First Amendment right to freedom of

speech by not renewing her one-year contract because she told Mrs. Monell, the secretary, Mr. Goheen, the assistant principal, and other teachers of her bisexuality. We conclude that the record does not support a finding that plaintiff established either constitutional violation.

A.

As this court held in *Ryan v. Aurora City Board of Education*, 540 F.2d 222, 227 (6th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), "a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system." Ohio has a statutory tenure system under which only tenured teachers acquire a property interest in their jobs. Thus this case comes under the rule that judicial review of actions of school authorities involving the administration of state teacher tenure laws is in the state rather than the federal courts unless the actions involve the deprivation of constitutional rights delineated by this court. *Id.* at 226. This delineation was made in *Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), where former Chief Judge Harry Phillips wrote for the court:

> . . . it is no longer open to debate that plaintiff would be entitled to relief if the board had refused to rehire him because he had exercised his rights as guaranteed by the free speech clause of the First Amendment. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8th Cir.), cert. denied, 393 U.S. 962, 89 S.Ct. 401, 21 L.Ed.2d 375; by the self incrimination clause of the Fifth Amendment, Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692; by the due process clause of the Fifth or Fourteenth Amendments, Greene v. McElory, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377; or by the equal protection clause of the Fourteenth Amendment, Hatton v. County Board of Education, 422 F.2d 457 (6th Cir.); Rolfe v. County Board of Education, 391

F.2d 77 (6th Cir.). These are constitutionally impermissible reasons for refusal to rehire a teacher.

444 F.2d at 134. Two of the constitutional deprivations listed in *Orr* are claimed in this case. The finding of a First Amendment violation is based on special verdict 7 that the board of education, knowingly and intentionally voted to not renew the plaintiff's contract solely on the basis of Superintendent Hopper's recommendation which was motivated in part by her statements to Mrs. Monell, Mr. Goheen and other teachers. The finding of an equal protection violation is based on special verdict 5 that DiNino and Hopper treated the plaintiff differently from similarly situated employees in suspending and transferring her because she is bisexual. We will examine the constitutional claims separately.

B.

The First Amendment Claim

The magistrate did not have the benefit of the recent decision of the Supreme Court in *Connick v. Myers*, _____ U.S. _____, 103 S.Ct. 1684 (1983). In *Connick* the Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 103 S.Ct. at 1690 (citation omitted). Earlier in the *Connick* opinion Justice White had stated the rule somewhat more concisely. After emphasizing the fact that *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its antecedents and progeny were concerned with safeguarding speech on matters of public concern, he wrote for the Court that if a public employee's statements cannot be fairly characterized as constituting speech on a matter of public concern, "it is unnecessary for us to scrutinize the reasons for her discharge." 103 S.Ct. at 1689 (footnote omitted).

Under the *Connick* test Ms. Rowland's statements were not protected speech. It is clear that she was speaking only in her personal interest. There was absolutely no evidence of any public concern in the community or at Stebbins High with the issue of bisexuality among school personnel when she began speaking to others about her own sexual preference. Moreover, Ms. Rowland told Mrs. Monell in confidence of her love for another woman and she asked the assistant principal to keep her revelation to him of her bisexuality confidential. When the plaintiff talked to other teachers about her sexual preference after the meeting with DiNino it was for the purpose of enlisting their aid in her efforts to remain at Stebbins High as a guidance counselor. Ms. Rowland's requests for confidentiality and the context of her discussions with others indicate that she did not consider her statements to be on matters of public concern. Thus, Ms. Rowland's own treatment of the issue of her sexual preference indicates that she recognized that the matter was not one of public concern. Her statements, like those of the plaintiff in *Connick*, were made as part of an individual effort to avoid unfavorable action by her employer. Finally, the record discloses no unusual circumstances which would have taken this case out of the *Connick* rule. The defendants were entitled to judgment as a matter of law on the First Amendment issue.

C.
The Equal Protection Claim

The finding of the magistrate on the equal protection claim contains ambiguities. He found that the school district did not violate Ms. Rowland's right to equal protection in voting to not renew her contract. That finding conforms to special verdict 5. In the same special verdict the jury found that the defendants DiNino and Hopper treated Ms. Rowland differently from similarly situated employees in suspending and transferring her "because she was homosexual/bisexual." Also in verdict 5 the jury found that

the plaintiff was not performing satisfactorily as a vocational guidance counselor. The jury identified her unsatisfactory conduct as disclosing to a third party that two of the students at the school were homosexual. This was a breach of confidence which reflected seriously on the plaintiff's judgment and qualifications as a counselor and would have been sufficient reason to suspend and reassign her. Under *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), where both permissible and impermissible reasons for disciplining a public employee are established, the court must decide whether "the Board ha[s] shown by a preponderance of the evidence that it would have reached the same decision as to [the plainfiff's] reemployment even in the absence of the protected conduct." The magistrate apparently attempted to obtain a jury finding on the *Mt. Healthy* question in special verdict 8 where it was asked whether if the plaintiff "had not been bisexual *and* if she had not told" others of her sexual preference, she would have been suspended and transferred "anyway for other reasons." The problem with this question is that it did not isolate the impermissible reason. The matter of her unsatisfactory performance was not included in the question to the jury. Further, we have held it was not impermissible to discipline the plaintiff for making statements about her sexual preference. Assuming that it was impermissible to do so for being bisexual, it is impossible to tell whether the jury found that plaintiff was suspended and transferred merely for being bisexual or for talking about it. All the jury found was that this discipline was imposed for a conbination of being bisexual and of making statements to others of her sexual preference. Even if there were no other grounds for reversing the equal protection award it would be necessary to remand for a proper *Mt. Healthy* determination.

Additionally, in colloquy with counsel about the special verdict question which asked whether Ms. Rowland had performed her job satisfactorily the magistrate stated:

> I think that in order to prove discrimination, the plaintiff has to prove that she was performing her job properly and then was fired or action was taken for no apparent legitimate reason.
>
> If you fail to prove that you're performing your job properly, I don't think you've made a prima facie case of discrimination. That's why that question is in there.

Tr. Vol. IV p. 203. Clearly the plaintiff failed to prove that she was performing her job properly. The jury found that her breach of confidence concerning two advisees constituted unsatisfactory performance. Yet the magistrate totally ignored this finding in his opinion. He made no equal protection analysis to determine whether suspension with pay was a rational response to such improper performance, but appeared to assume that the answers to other special verdicts made this finding irrelevant.

There are other errors which require reversal and dismissal. There was absolutely no evidence to support the finding that Ms. Rowland was treated differently from other similarly situated employees. There was no evidence of how other employees with different sexual preferences were treated. Neither DiNino nor Hopper was asked a hypothetical question concerning the treatment of similarly situated employees. The jury was puzzled by the questions in special verdict 5 and asked for definition of "similarly situated." In colloquy with counsel before answering the inquiry the magistrate stated "there really isn't any evidence in this case on any similarly situated employee anyway." Tr. Vol. IV, p. 353. Thus he required the jury to make findings on an issue which he recognized as having been the subject of no proof. This was plain error. Since plaintiff failed to produce any proof that she was treated differently from other similarly situated employees there was nothing to submit to the jury on this issue.

In finding the school district liable for Hopper's actions the magistrate concluded that the superintendent was

acting for the district in suspending and transferring the plaintiff. There is no doubt that Hopper acted for the board, but that is not sufficient to hold the school district liable. In overruling its previous decisions granting political subdivisions immunity in § 1983 actions the Supreme Court made it clear that a local government cannot be held liable on a *respondeat superior* theory. *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). Liability may be predicated, however, upon an unconstitutional act performed by an officer or employee in carrying out a policy or custom of the employer. *Id.* at 690-91. There was no evidence that Hopper was carrying out a policy or custom of the school district in suspending and transferring the plaintiff. The magistrate ruled that there was no official policy of the school district with respect to homosexuals and bisexuals, and the plaintiff did not object. There was also no proof of a policy or custom of suspending guidance counselors for their sexual preferences. The district cannot be held liable for an action of an employee which was totally unrelated to any policy or custom of his public employer.

The plaintiff argues that she was injured by an unconstitutional act and is entitled to compensation, citing *Owen v. City of Independence*, 445 U.S. 622 (1980). She argues that Hopper was a "decisionmaker" who made policy in the areas of suspension and transfer. However, there was no evidence that in making the single, discrete decision to suspend Ms. Rowland, the superintendent was either executing or implementing policy or custom. See *Dunn v. State of Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982) *cert. denied*, 103 S.Ct. 1778 (1983); *Johnson v. Granholm*, 662 F.2d 449 (6th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). The reference to "decisionmaker" in *Owen* does not weaken or dispense with the rule that local governments are liable for constitutional torts of their employees only when inflicted in the execution or implementation of policy or custom. The holding in *Owen* was that a local government

has no immunity from liability under § 1983 flowing from its constitutional violations and that it cannot assert the good faith immunity of its officers as a defense. The Court in *Owen* did not alter the *Monnell* requirement that the action be taken in the implementation or execution of official policy or custom. *Owen*, 445 U.S. at 655 n. 39.

It is clear that the board was not involved in the decision to suspend and transfer Ms. Rowland. The decisions were made by Hopper in consultation with DiNino. The plaintiff made no claim that the school board should have overruled the superintendent's decisions and made no objection to the magistrate's failure to submit a question concerning its inaction for a special verdict. The plaintiff failed to carry her burden of proof that the school district was liable for her suspension and transfer, assuming either or both actions by the superintendent were impermissible.

We conclude that the defendant-appellant Mad River Local School District was entitled to judgment on both the First and Fourteenth Amendment claims. Though other constitutional violations were pled, the plaintiff permitted the case to be submitted without objection on claims of free speech, equal protection and access to the courts only. The jury's finding that no disciplinary measures were taken in retaliation for Ms. Rowland's suit against the defendants eliminated the access claim. This opinion disposes of the free speech and equal protection claims.

The dissent's gratuitous statement that the majority treats this case as one involving a sick person is totally wrong. It is true that plaintiff has attempted to make homosexual rights the issue in this case. However, her personal sexual orientation is not a matter of public concern, and we have decided the First Amendment issue on the basis of the latest Supreme Court treatment of legally similar claims. And, as we have pointed out, the plaintiff sought to prevail on her equal protection claim without any showing that heterosexual school employees in situations

similar to hers have been, or would be, treated differently for making their personal sexual preferences the topic of comment and discussion in the high school community. Again, this is nothing more than the required analysis of an equal protection claim.

The judgment of the district court is reversed with directions to enter judgment for the appellant. No costs are taxed on appeal.

Edwards, Circuit Judge, dissenting. Respectfully, I dissent.

This school teacher has been deprived of her job solely because she let it be known to some colleagues and, through them, to her administrative superiors that her sexual preference was for another woman. She filed a 42 U.S.C. § 1983 complaint alleging violations of federal constitutional rights, particularly as set forth in the first and fourteenth amendments. A southwestern Ohio jury has now found in her favor on all relevant counts and has awarded substantial money damages. The Magistrate before whom the case was tried and the District Judge have entered judgment in her favor. I would affirm.

This record presents a clear cut issue as to whether a citizen's mere statement of a homosexual preference may be punished by job loss by the joint decision of a school superintendent, a public school principal and assistant principal, and the school board, as a matter of institutional policy. I find no language in the Constitution of the United States which excludes citizens who are bisexual or homosexual from its protection, and particularly of the protection of the first and fourteenth amendments thereto. The Constitution protects all citizens of the United States; no language therein excludes the homosexual minority. Like all citizens, homosexuals are protected in these great rights, certainly to the extent of being homosexual and stating their sexual preference in a factual manner where there is no invasion of any other person's rights.

While the Supreme Court of the United States has not, to this date, decided this specific issue, it has also decided no case to the contrary of the view expressed above.

I. The First Amendment

In particular I cannot agree with the majority that Justice White's opinion in *Connick v. Meyers*, _____ U.S. _____, 103 S.Ct. 1684 (1983) supports the plaintiff's termination in this case. I do not view this discharge (or failure to rehire) as based upon this employee's "behavior." There is neither charge nor proof of anything plaintiff did which led to the termination, other than being bisexual and expressing the fact. If we recognize her right to a jury trial, we must also accept the jury's conclusion that if plaintiff "had not been bisexual and if she had not told Mrs. Monell, the secretary, of her sexual preference," she would not have been suspended or transferred and the Board of Education would not have failed to renew her contract "anyway for other reasons." Special Verdict VIII, Appendix A. Clearly under this jury finding it was "speech" which occasioned her termination.

The detailed findings of the jury, set forth in Appendix A to this dissent, make equally clear that it was not the fact that plaintiff told a secretary in her office that two students she was counseling were homosexual that caused her to not be rehired. *Id.*

Like the majority, I recognize that under the *Connick* case, appellant cannot prevail on her first amendment claim if the speech is "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest. . . ." _____ U.S. _____, 103 S.Ct. 1684, 1690 (1983). While, for all this record shows, her first disclosure to the secretary may have been intended to be confidential, plaintiff's later statements were clearly a part of an effort to establish her right to her job while admitting being bisexual. Long before her nonrenewal/discharge,

plaintiff became a center of public controversy in the Mad River School community involving the same issue of homosexual rights which has swirled nationwide for many years. This record leaves no doubt but that her statements about her status resulted in "public concern"—both pro and con. As the Supreme Court has consistently held:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

Tinker v. Des Moines School District, 393 U.S. 503, 506 (1968).

To summarize the first amendment aspect of this case, the speech may not have had its origin in an overt attempt to exercise freedom of speech. But speech it was. It revealed plaintiff's status as a homosexual in what at the outset she may have presumed to be a confidential relationship. When, however, that speech was spread to school authorities and the community, plaintiff's adherence to her right both to be what she was and to state the fact brought down on her head the wrath of some parents and termination of her job by the ruling authorities of her school. There is evidence in this record that organized parental pressures were involved in the ultimate nonrenewal/discharge. Clearly at the point of discharge, there was a controversy in process over an important public issue.

While this incident did not generate national attention, in southern Ohio it was an important matter of public concern. It thus became a part of the nationwide debate on homosexuality and the rights or lack thereof of homosexuals —a debate of far greater significance than the majority opinion recognizes. *See People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981). *See*

also New York v. Uplinger, 58 N.Y.2d 936 (1983), *cert. granted*, 52 U.S.L.W. 3229 (U.S. October 3, 1983) (82-1724).

II. Equal Protection

Turning now to the fourteenth amendment aspect of this case, I perceive no reason to deny plaintiff her rights under the equal protection clause of that amendment. Assume for a moment that all the same facts applicable to this case were before us in a case where the first disclosure to the secretary had been by a teacher whose appearance was consistent with majority race status, but who revealed she had a black parent. If community protests in this rural southwest Ohio county had convinced the principal and school board to non-renew that teacher, would there be any doubt about whether or not this was "policy" and a case for a federal constitutional remedy. I find no logical equal protection distinction between these two minority discrimination situations, both of which evoke deeply felt prejudices and fears on the part of many people.[1] I believe that all of the many federal cases which have held on equal protection grounds that school authorities could not discharge teachers for racially discriminatory reasons without offending the fourteenth amendment to the U.S. Constitution and which have invoked a federal court remedy are equally applicable to this case. *McFerren, Jr., et al. v. County Board of Education*, 455 F.2d 199 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972); *Hatton v. County Board of Education*, 422 F.2d 457 (6th Cir 1970); *Rolfe v. County Board of Education*, 391 F.2d 77 (6th Cir. 1968).

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[1]It is, of course, historic fact that Congress' dominant concern in adopting the fourteenth amendment was to protect the rights of the newly freed slaves. Nonetheless the amendment's general language contains no restriction and has been applied generally to situations which were never discussed in the debate which preceded its adoption and ratification. *See*, for only one example, the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

I would also hold that there is no need for a *Mt. Healthy* remand before affirming the judgment of the district court. *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). She was bisexual by preference. She said so. She was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason. *See* Special Verdict VIII(5), Appendix A.

The majority also would remand the case because of inadequate evidence of disparate treatment, despite a jury finding that Rowland was treated differently than other employees because of her sexual preference. *See* Special Verdict, Appendix A. The jury had heard ample evidence to find that, but for the fact that she revealed her sexual preference, she would not have been either transferred, or suspended by Superintendent Hopper and Principal DeNino, or "non-renewed" by the Board. The School District has not challenged these findings. The jury clearly did not believe that the above actions would have been taken against Rowland if she had not admitted a sexual preference which Superintendent Hopper, Principal DeNino and, ultimately, the School Board disapproved of. The question was one of credibility and logical inference which the jury was uniquely positioned to resolve.

III. Immunity Under 42 U.S.C.§ 1983

As we have seen earlier, there is no obstacle to imposing § 1983 liability on the school district. The individuals who acted in this case, the superintendent of schools, and the school board, are school district policymakers who, beyond a doubt, formulated and executed school district policy in the discharge/nonrenewal of this teacher because of her sexual preference. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 694 (1977). *See Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 656 (1980). The Sixth Circuit cases cited by the majority are distinguishable, and do not immunize the school district.

IV. The Reality of This Case

My colleague's opinion seems to me to treat this case, *sub silentio*, as if it involved only a single person and a sick one at that—in short, that plaintiff's admission of homosexual status was sufficient in itself to justify her termination. To the contrary, this record does not disclose that she is subject to mental illness; nor is she alone.

Careful studies of homosexuality have now established two facts of which the courts should be aware and should take judicial notice. The first is that homosexuality is not a mental disease, like insanity or a psychopathic personality. The second is the extent of homosexuality in the United States.

In 1979, the Surgeon General issued a memorandum as follows:

> PHS policy regarding certification of mental defect or disease under Title 8, section 1224 United States Code
>
> The public Health Service policy regarding the physical and mental examination of aliens pursuant to Title 8, section 1224 of the United States Code has been revised. According to this revision homosexuality per se will no longer be considered a "mental disease or defect."
>
> This revision has been made for two reasons: First, the change will reflect current and generally accepted canons of medical practice with respect to homosexuality. Specifically, according to the 1974 edition of the Diagnostic and Statistical Manual II (DSM II) of Mental Disorders of the American Psychiatric Association homosexuality is not considered to be a mental disorder. (Note: The DSM is one of the most authoritative diagnostic manuals for the conduct of psychiatric examinations in the United States, and constitutes the complete listing of currently recognized psychiatric diagnoses.) This manual states that "homosexuality per se is one form of sexual behavior, and with other forms of sexual behavior which are not by themselves psychiatric disorders are not listed in this nomenclature."

The newest edition of the DSM (DSM III) has been approved by the Board of Trustees of the American Psychiatric Association and will be released in November 1979. In the DSM III a decision not to include homosexuality as a psychiatric disorder has been sustained.

The American Psychiatric Association's actions have been endorsed by official resolutions adopted by the American Psychological Association, the American Public Health Association, the American Nurses' Association and the Council of Advanced Practitioners in Psychiatric and Mental Health Nursing of the American Nurses' Association.

The Public Health Service has traditionally relied upon the professional expertise of associations such as these for advice and information on a wide variety of physical and mental health issues. Accordingly, this change in the policy of the PHS with respect to the physical and mental examination of aliens has been made to reflect the most current judgments of health professionals on this subject.

The second reason for this change is that the determination of homosexuality is not made through a medical diagnostic procedure.

Effective this date, PHS medical officers, civil surgeons, and panel physicians will no longer certify that homosexuality per se is a mental disease or defect.

Quarantine inspectors will no longer issue medical holds on aliens suspected solely of being homosexual.

The Immigration and Naturalization officials and Department of State Consular officers will be advised of this change and will be advised that in accord with this change they should no longer refer aliens suspected only of being homosexual to the PHS for certification of a mental disease or defect under 8 USC 1224.

Please notify all relevant Public Health Service personnel that, for the foregoing reasons, PHS medical officers shall not issue certificates or notifications relating to mental defects or diseases under 42 CFR 34.7 solely because an alien is suspected of being a homosexual.
56 *Interpreter Releases* 398-99 (August 17, 1979).

While this statement directly related to exclusion from the United States of aliens seeking admission either as visitors or permanent residents, and the Attorney General, in a subsequent memorandum, disavowed its impact, the Surgeon General's memorandum is nonetheless an authoritative statement of modern medical opinion concerning homosexuality.

In dealing with this type of case, this court (and others) should be aware and take judicial notice of the monumental works concerning the incidence of homosexuality in males and females in the United States. *See* A. Kinsey, W. Pomeroy & C. Martin, *Sexual Behavior in the Human Male* (1948); A. Kinsey, W. Pomeroy, C. Martin & P. Gebhard, *Sexual Behavior in the Human Female* (1953); A. Bell & M. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (1978). The following sentences represent cumulative summaries of Kinsey's authoritative works on homosexual incidence in males and females:

> In these terms (of physical contact to the point of orgasm), the data in the present study indicate that at least 37 per cent of the male population has some homosexual experience between the beginning of adolescence and old age (U.S. Corrections. See Table 139, Figure 156).

Kinsey et al., *Sexual Behavior in the Human Male* 623 (1948).

* * *

> [T]he accumulative incidences of overt contact to the point of orgasm among the females had reached 13 per cent (Table 131, Figure 82); among the males they had reached 37 per cent.

Kinsey et al., *Sexual Behavior in the Human Female* 474-75 (1953).

Perhaps the quickest summary of Kinsey's work is found in Marmor, *Homosexual Behavior: A Modern Reappraisal* (1980):

> The Kinsey reports represent the most thorough and extensive surveys done to date. A number of smaller studies have been made in Europe, and all are in approximate agreement with the Kinsey findings (Romer, 1906; Hirschfeld, 1920; Friedeberg, 1953; and Schofield, 1965). On the basis of these various studies it is fair to conclude, conservatively, that the incidence of more or less exclusively homosexual behavior in Western culture ranges from 5 to 10 percent for adult males and from 3 to 5 percent for adult females. If bisexual behavior is included, the incidence may well be twice these figures. It is clear, therefore, that the propensity for homosexual reactivity is a widespread one even in societies such as ours which strongly discourage it.

On the facts and circumstances presented here, I would affirm the jury's verdict and the judgment entered by the Magistrate and the District Judge.

APPENDIX A

SPECIAL VERDICT I

During the fall of 1974, Mrs. Rowland told Elaine Monell, the secretary, that she, Mrs. Rowland, was in love with a woman.

1. Did Mrs. Rowland's statement to Elaine Monell regarding Mrs. Rowland's love for a woman in any way interfere with the proper performance of either Mrs. Rowland's or Elaine Monell's duties or with the regular operation of the school generally? In order to answer "NO", you must be satisfied by a preponderance of the evidence that it did not.)

   YES ✓ NO

2. If your answer to question 1 was "YES", state in the notebook provided how the statement in question interfered with the performance of duties and/or how it interfered with the regular operation of the school.

3. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the decision to

suspend Mrs. Rowland was motivate at least in part by her statement to Elaine Monell regarding her bisexuality?

✓ YES NO

4. Are you satisfied by a preponderance of the evidence that Defendant Hopper's suspension of Mrs. Rowland was motivated at least in part by her statement to Elaine Monell regarding her bisexuality?

✓ YES NO

5. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the decision to transfer Mrs. Rowland to a position with no student contact was motivated at least in part by her statement to Elaine Monell regarding her bisexuality?

✓ YES NO

6. Are you satisfied by a preponderance of the evidence that Defendant Hopper's transfer of Mrs. Rowland to a position with no student contact was motivated at least in part by her statement to Elaine Monell regarding her bisexuality?

✓ YES NO

7. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the recommendation to the Board of Education that Mrs. Rowland's contract not be renewed was motivated at least in part by her statement to Elaine Monell regarding her bisexuality?

✓ YES NO

8. Are you satisfied by a preponderance of the evidence that Defendant Hopper's recommendation that Mrs. Rowland's contract not be renewed was motivated at least in part by her statement to Elaine Monell regarding her bisexuality?

✓ YES NO

SPECIAL VERDICT II

Mrs. Rowland counseled a student who was homosexual and the student's mother was present. The mother was very upset with Mrs. Rowland and accused her of being homosexual also. Mrs. Rowland was concerned that the mother would complain to Mr. DiNino or Mr. Goheen, the assistant principal, so she went to Mr. Goheen, and told him she was concerned about her job because she was bisexual. Mr. Goheen told her that she should not be concerned and that he would keep the matter confidential.

1. Did Mrs. Rowland's statement to Mr. Goheen regarding her bisexuality in any way interfere with the proper performance of either Mrs. Rowland's or Mr. Goheen's duties or with the regular operation of the school generally? (In order to answer "NO", you must be satisfied by a preponderance of the evidence that it did not.)

   YES ✓ NO

2. If your answer to question 2 was "YES", state in the notebook provided how the statement in question interfered with the performance of duties and/or how it interfered with the regular operation of the school.

3. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the decision to suspend Mrs. Rowland was motivated at least in part by her statement to Mr. Goheen regarding her bisexuality?

   ✓ YES NO

4. Are you satisfied by a preponderance of the evidence that Defendant Hopper's suspension of Mrs. Rowland was motivated at least in part by her statement to Mr. Goheen regarding her bisexuality?

   ✓ YES NO

5. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the decision to transfer Mrs. Rowland to a position with no student

contact was motivated at least in part by her statement to Mr. Goheen regarding her bisexuality?

✓ YES NO

6. Are you satisfied by a preponderance of the evidence that Defendant Hopper's transfer of Mrs. Rowland to a position with no student contact was motivated at least in part by her statement to Mr. Goheen regarding her bisexuality?

✓ YES NO

7. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the recommendation to the Board of Education that Mrs. Rowland's contract not be renewed was motivated at least in part by her statement to Mr. Goheen regarding her bisexuality?

✓ YES NO

8. Are you satisfied by a preponderance of the evidence that Defendant Hopper's recommendation to the Board of Education that Mrs. Rowland's contract not be renewed was motivated at least in part by her statement to Mr. Goheen regarding her bisexuality?

✓ YES NO

SPECIAL VERDICT III

In the fall of 1974 Mrs. Rowland made statements to fellow teachers at Stebbins High School regarding her bisexuality.

1. Did Mrs. Rowland's statements to the teachers regarding her bisexuality in any way interfere with the proper performance of either Mrs. Rowland's or the teachers' duties or with the regular operation of the school generally? (In order to answer "NO", you must be satisfied by a preponderance of the evidence that they did not.)

YES ✓ NO

2. If your answer to question 2 was "YES", state in the notebook provided how the statements in question interfered with the performance of duties and/or how they interfered with the regular operation of the school.

3. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the decision to suspend Mrs. Rowland was motivated at least in part by her statements to the teachers regarding her bisexuality?

✓ YES NO

4. Are you satisfied by a preponderance of the evidence that Defendant Hopper's suspension of Mrs. Rowland was motivated at least in part by her statements to the teachers regarding her bisexuality?

✓ YES NO

5. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the decision to transfer Mrs. Rowland to a position with no student contact was motivated at least in part by her statements to the teachers regarding her bisexuality?

✓ YES NO

6. Are you satisfied by a preponderance of the evidence that Defendant Hopper's transfer of Mrs. Rowland to a position with no student contact was motivated at least in part by her statements to the teachers regarding her bisexuality?

✓ YES NO

7. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the recommendation to the Board of Education that Mrs. Rowland's contract not be renewed was motivated at least in part by her statements to the teachers regarding her bisexuality?

✓ YES NO

8. Are you satisfied by a preponderance of the evidence that Defendant Hopper's recommendation to the Board of Education that Mrs. Rowland's contract not be renewed was motivated at least in part by her statements to the teachers regarding her bisexuality.

✓ YES NO

SPECIAL VERDICT IV

1. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the decision to transfer Mrs. Rowland to a position with no student contact was motivated at least in part because she had filed a lawsuit regarding her suspension?

YES ✓ NO

2. Are you satisfied by a preponderance of the evidence that Defendant DiNino's participation in the recommendation that Mrs. Rowland's contract not be renewed was motivated at least in part because she had filed a lawsuit regarding her suspension?

YES ✓ NO

3. Are you satisfied by a preponderance of the evidence that Defendant Hopper's transfer of Mrs. Rowland to a position with no student contact was motivated at least in part because she had filed a lawsuit regarding her suspension?

YES ✓ NO

4. Are you satisfied by a preponderance of the evidence that Defendant Hopper's recommendation that Mrs. Rowland's contract not be renewed was motivated at least in part because she had filed a lawsuit regarding her suspension?

YES ✓ NO

5. Are you satisfied by a preponderance of the evidence that the Board of Education voted not to renew Mrs. Rowland's contract at least partly because she had filed

a lawsuit regrading her suspension?

YES ✓ NO

SPECIAL VERDICT V

1. Are you satisfied by a preponderance of the evidence that Defendant DiNino, in participating in the decision to suspend Mrs. Rowland, treated her any differently than similarly situated employees, because she was homosexual/bisexual?

✓ YES NO

2. Are you satisfied by a preponderance of the evidence that Defendant Hopper, in suspending Mrs. Rowland, treated her any differently than similarly situated employees, because she was homosexual/bisexual?

✓ YES NO

3. Are you satisfied by a preponderance of the evidence that Defendant DiNino, in participating in the decision to transfer Mrs. Rowland to a position with no student contact, treated her any differently than similarly situated employees, because she was homosexual/bisexual?

✓ YES NO

4. Are you satisfied by a preponderance of the evidence that Defendant Hopper, in transferring Mrs. Rowland to a position with no student contact, treated her any differently than similarly situated employees, because she was homosexual/bisexual?

✓ YES NO

5. Are you satisfied by a preponderance of the evidence that Defendant DiNino, in participating in the recommendation that Mrs. Rowland's contract not be renewed, treated her any differently than similarly situated employees, because she was homosexual/bisexual?

✓ YES NO

6. Are you satisfied by a preponderance of the evidence that Defendant Hopper, in recommending that Mrs. Rowland's contract not be renewed, treated her any differently than similarly situated employees, because she was homosexual/bisexual?

✓ YES NO

7. Are you satisfied by a preponderance of the evidence that the Board of Education, in voting not to renew Mrs. Rowland's contract, treated her any differently than similarly situated employees, because she was homosexual/bisexual?

YES ✓ NO

8. Are you satisfied by a preponderance of the evidence that, at the time of her suspension, Mrs. Rowland was not performing her position as vocational guidance counselor in a satisfactory manner?

✓ YES NO

9. If your answer to question 8 is "YES", state in the notebook provided in what way her performance was unsatisfactory. Please be specific.[1]

SPECIAL VERDICT VI

A school official acts in good faith if he acts sincerely and with a belief that he is doing right, and if his conduct is justified by an objectively reasonable belief that it was lawful. A school official does not act in good faith if he acts with malicious intention to deprive an employee, such as Mrs. Rowland, of her constitutional rights, or if he knew or reasonably should have known that his actions would violate her constitutional rights.

During the 1974-75 school year, there was no clearly established constitutional right to be homosexual or bisexual,

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[1]The response to this special verdict is found following "Special Verdict VIII(6), at A.29a.

or to have as one's sexual orientation and preference homosexuality or bisexuality. The law was uncertain concering whether or not statements regarding bisexuality made in a high school setting were constitutionally protected.

1. Are you satisfied by a preponderance of the evidence that Defendant DiNino acted in good faith by participating in the decision to suspend Mrs. Rowland?

   ✓ YES NO

2. Are you satisfied by a preponderance of the evidence that Defendant DiNino acted in good faith by participating in the decision to transfer Mrs. Rowland to a position with no student contact?

   ✓ YES NO

3. Are you satisfied by a preponderance of the evidence that Defendant DiNino acted in good faith by participating in the decision to recommend nonrenewal of Mrs. Rowland's contract?

   ✓ YES NO

4. Are you satisfied by a preponderance of the evidence that Defendant Hopper acted in good faith by suspending Mrs. Rowland?

   ✓ YES NO

5. Are you satisfied by a preponderance of the evidence that Defendant Hopper acted in good faith by transferring Mrs. Rowland to a position with no student contact?

   ✓ YES NO

6. Are you satisfied by a preponderance of the evidence that Defendant Hopper acted in good faith by recommending non-renewal of Mrs. Rowland's contract?

   ✓ YES NO

SPECIAL VERDICT VII

1. Are you satisfied by a preponderance of the evidence that the Board of Education knowingly and intention-

ally voted not to renew Mrs. Rowland's contract?

✓ YES NO

2. If your answer to question 1 is "YES", do you find that the Board of Education acted for any reason other than the recommendation of the superintendent, Dr. Hopper, when it voted not to renew Mrs. Rowland's contract?

YES ✓ NO

3. If your answer to question 2 is "YES", state the reason for the Board's action in the notebook provided.

SPECIAL VERDICT VIII

1. If Mrs. Rowland had not been bisexual and if she had not told teachers and Mrs. Monell, the secretary, of her sexual preference, are you satisfied by a preponderance of the evidence that she would have been suspended anyway for other reasons?

YES ✓ NO

2. If the answer to question 1 is "YES", state the other reasons in the notebook provided.

3. If Mrs. Rowland had not been bisexual and if she had not told teachers and Mrs. Monell, the secretary, of her sexual preference, are you satisfied by a preponderance of the evidence that she would have been transferred to a position with no student contact anyway for other reasons?

YES ✓ NO

4. If the answer to question 3 is "YES", state the other reasons in the notebook provided.

5. If Mrs. Rowland had not been bisexual and if she had not told teachers and Mrs. Monell, the secretary, of her sexual preference, are you satisfied by a preponderance of the evidence that her contract would not have been renewed anyway for other reasons?

YES ✓ NO

6. If the answer to question 5 is "YES", state the other reasons in the notebook provided.

9. In what way was Mrs. Rowland's performance in her position as vocational guidance counselor unsatisfactory?

Her performance was unsatisfactory because she revealed to Mrs. Monell the sexual orientation of two students when it was not necessary to do so.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82-3218

MARJORIE H. ROWLAND,
Plaintiff-Appellee,

v.

MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO, A PUBLIC BODY CORPORATE,
Defendant-Appellant

ORDER

Filed In The
United States Court of Appeals
For The Sixth Circuit
John P. Hehman, Clerk
June 4, 1984

BEFORE: LIVELY, Chief Judge; EDWARDS and KRUPANSKY, Circuit Judges.

Less than a majority of the judges in active service on the court having requested en banc consideration of the petition for rehearing filed herein by the plaintiff-appellee, the petition has been referred to the hearing panel for disposition.

Upon consideration, the panel concludes that the issues addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

The petition for rehearing is denied.

Judge Edwards dissents.

APPENDIX C

ENTERED BY ORDER OF THE COURT Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-3-75-125

MARJORIE H. ROWLAND,

Plaintiff

v.

MAD RIVER LOCAL SCHOOL DISTRICT, et al.,

Defendants

OPINION

This Opinion supports the Order filed October 19, 1981 regarding Judgments to be entered in this case. All judgments are to be entered at the conclusion of jury deliberation on the issue of damages.

Background of the Case

Plaintiff filed this action on May 27, 1975, alleging that Defendants suspended her from her position as school guidance counselor, transferred her to a position with no student contact, and did not renew her employment contract for the 1975-76 school year "because Plaintiff is bisexual, because she had announced her bisexuality to others, (and) because she had filed a lawsuit against Defendants. . . ."

On August 19, 1977, the District Court for the Southern District of Ohio dismissed this action on the basis that there was no constitutional right to engage in homosexual conduct, *Doe v Commonwealth's Attorney for City of*

Richmond, 403 F.Supp. 1199 (E. D. Va. 1975), aff'd., 425 U.S. 901 (1976), reh. den., 425 U.S. 985 (1976); *Matlovich v. Secretary of the Air Force*, F.Supp. , 45 U.S.L.W. 2074 (D.D.C. 1976), and because no authority was given for the proposition that discrimination on the basis of sexual preference was forbidden by the Constitution.

On January 2, 1980, the U. S. Court of Appeals for the Sixth Circuit vacated the judgment of the District Court because neither the Supreme Court of the United States nor the Sixth Circuit had ruled on the precise issues in this case. The Court of Appeals remanded the case to the District Court for "development of the circumstances surrounding the decision of Defendants."

On February 18, 1981, the case was referred to the United States Magistrate for further proceedings. On March 31, 1981, the parties unanimously consented to the magistrate presiding over the jury trial of this case and entering final judgment thereon, as well as ruling on all pre-trial and post-trial motions.

Plaintiff's Constitutional Rights

Three constitutional rights are at issue in this case: the right of access to the courts, the right of equal protection of the law, and the right of free speech.[1]

The due process clause of the Fourteenth Amendment to the United States Constitution gives Plaintiff the right to access to the courts. Pursuant to this right, Defendants may not retaliate against Plaintiff because she previously filed a lawsuit against them.

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[1]The Court of Appeals determined in a companion case that Plaintiff has no right to claim a violation of the due process clause of the Fourteenth Amendment based upon alleged arbitrary and capricious action of Defendants because her limited contract did not give her a continuous expectancy of employment constituting a property interest. *See, Rowland v. Mad River Local School District*, F.2d , #76-2450 (6th Cir., 1977).

Although the Constitution does not create any right to engage in homosexual conduct or to be bisexual, it does give Plaintiff the right to equal protection of the law. Defendants may not treat Plaintiff any differently than employees in positions of similar responsibility and with comparable work records solely because she was homosexual or bisexual.

The First Amendment to the Constitution gives Plaintiff the right to freedom of speech. However, this right is not absolute. In order to determine whether Plaintiff's speech in this case was protected by the Constitution, it is necessary to arrive at a balance between the interests of Plaintiff, as a citizen, in making the statements at issue and the interests of Defendants, as employers, in having their employees properly perform their duties and in having the school operate in a normal fashion.

Because there were factual disputes in the trial testimony, (including disputes regarding the reasons for Defendants' actions and regarding whether Plaintiff's statements to others did or did not interfere with Defendants' interests in operating the school), and because the Court of Appeals had ordered this Court to develop the facts of the case, we determined that it would be appropriate to utilize special verdict forms in order to resolve the disputed facts. Eight special verdict forms containing specific questions were utilized because there were three Defendants to be considered by the jury individually[2], because each Defendant might have been involved in three separate actions, and because there were two defenses available to some Defendants. In addition, special verdict answer forms were

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[2]The Court directed a verdict in favor of Defendants Bell, Jeffries, Dunham, Dunkle and Roemer on the basis that Plaintiff had failed to establish a *prima facie* case and because the evidence introduced in Plaintiff's case in chief demonstrated that these Defendants acted in good faith. This ruling was later confirmed by the jury's verdict that Defendants Hopper and DiNino acted in good faith.

provided in the event the jury found it necessary to provide specific written information in answer to certain questions. The special verdicts resolved all legal issues in the case, save one: the liability of the Defendant Mad River Local School District (hereinafter referred to as School District).

Plaintiff's Right to Access to the Courts

In Special Verdict IV, the jury determined that Plaintiff failed to prove by a preponderance of the evidence that the participation of either Mr. DiNino or Dr. Hopper in the suspension and transfer of Mrs. Rowland was motivated at least in part because she had filed a lawsuit regarding her suspension. The jury also found that Plaintiff failed to prove by a preponderance of the evidence that either Mr. DiNino, Dr. Hopper or the Board of Education recommended or voted not to renew Plaintiff's employment contract at least in part because she had filed a lawsuit regarding her suspension.

Thus the jury determined that no Defendant acted in retaliation against Plaintiff because she filed a lawsuit, and her right to access to the Courts was not abridged.

Plaintiff's Right to Equal Protection of the Law

Defendants argued to the jury that no actions were taken against Plaintiff because she was homosexual or bisexual, or because she told other employees at Stebbins High School that she was bisexual. Rather, Defendants claimed, the actions in question were taken because Plaintiff was performing her job poorly, and because the following two incidents created serious problems for school administrators.

The first incident involved Plaintiff's revelation of the identity and homosexuality of two students she had been counseling. Plaintiff claimed that the vocational secretary at the High School was annoyed by these students and made it difficult for them to see Plaintiff. Therefore, in

order to impress upon the secretary how important it was for these students to have access to Plaintiff, she told the secretary they were homosexual and were having serious difficulties dealing with that fact. Plaintiff claimed the students had given her permission to reveal their identities where it was necessary to her work. Defendants claimed that Plaintiff revealed the identity of the students voluntarily and without sufficient reason. Expert witnesses in the field of guidance counseling testified that it would be a violation of counseling ethics to reveal such information about a student unless it were absolutely necessary to aid the student or unless the student agreed to disclose the information. In Special Verdict V, the jury determined that Mrs. Rowland had performed her position improperly by revealing the sexual orientation of the two students when it was not necessary to do so.

The second incident involved Plaintiff's attendance at a "Literature and Survival" class taught by a teacher in the English Department. Defendants claimed that Mrs. Rowland conducted the class and questioned students on their sexual habits and orientation, asking questions such as, "Do you like sex?" and "Do you like oral sex?" Defendants claimed that Mrs. Rowland revealed to the students that she was bisexual and related a conversation with her girlfriend concerning sexual subjects. Plaintiff claimed that her only role in the class was to read questions submitted by the students and to facilitate classroom discussion. Plaintiff claimed the questions related primarily to sexual subjects.

The jury resolved this conflict between the positions of Plaintiff and Defendants in Special Verdicts I, II, III, and VIII. They found that Mr. DiNino and Dr. Hopper acted as they did toward Plaintiff because of the statements she had made to the secretary, the assistant principal and other teachers regarding her bisexuality. The jury rejected Defendants' claims by finding that Defendants had failed to

prove by a preponderance of the evidence that, if Mrs. Rowland had not been bisexual and had not told teachers, the assistant principal, and the secretary of her sexual preference, the actions would have been taken anyway for other reasons, such as those set forth above.

In Special Verdict V the jury found that Defendants DiNino and Hopper violated Plaintiff's constitutional right to equal protection of the law in regard to the suspension, transfer and nonrenewal by treating her differently than employees in positions with similar responsibilities and with comparable work records. In that same Special Verdict, the jury found that the Board of Education did not violate Plaintiff's right to equal protection of the laws by voting not to renew her contract, because in their action they did not treat Plaintiff differently than similarly situated employees.

The question remains whether the School District is liable for the acts of either Mr. DiNino or Dr. Hopper which violated Plaintiff's equal protection rights. See discussion, p.8, infra.

Plaintiff's Right to Freedom of Speech

Although Defendants argued that the suspension, transfer and nonrenewal were not due to Plaintiff's statements to the secretary, the assistant principal, and other teachers regarding her bisexuality, Defendants also claimed that her statements impeded the performance of Plaintiff's and other persons' duties and interfered with the regular operation of the school. Therefore, they argued, the statements were not protected by the First Amendment. During arguments presented after the jury verdict, counsel for the School District argued that Plaintiff's statements were of no value at all under the First Amendment and thus were not protected in any event.

The Supreme Court has historically rejected the theory, often espoused by Justice Black, that First Amendment

rights are absolute. Long ago the Court found that the First Amendment was not intended to give immunity for every possible use of language. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Not every type of speech must be weighed against evidence of the danger created. Certain statements are entitled to no protection because their very utterance tends to inflict injury or incite an immediate breach of peace: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . ." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.*** For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press". It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

Bridges v. California, 314 U.S. 252, 263 (1941) (Footnote omitted).

These concepts have been applied to the field of public education. The question of whether statements of a public school employee are constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The interests of the School District have also been recognized by the Supreme Court:

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.****

Adler v. Board of Education, 342 U.S. 485, 493 (1952).

Through a balancing of these important values, the Supreme Court has found a teacher's public communication[3] and a teacher's private expression[4] to be protected under appropriate circumstances:

> Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Id.*, at 572-573. Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

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[3]*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

[4]*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415 n.4 (1979). (Emphasis in original).

The fact that Plaintiff did not speak out in a public forum does not strip her speech of protection, nor does the fact that the statements may have contained information which the listener either did not wish to hear or felt was repugnant to him. The right to free speech does not arise from the content of the speech alone, but from a person's desire to express his thoughts, either publicly or privately, without the fear of punishment for such expression. The issue is not whether the listener felt the speech had value or even whether the listener was offended or upset at the remark. The question is whether the School District had a legitimate, overriding governmental interest in penalizing Plaintiff for making the statements in question.

In this case, the School District would have had such an interest if Plaintiff's statements regarding bisexuality significantly impeded the performance of any employee's duties or disrupted the operation of the school. *Pickering v. Board of Education*, 391 U.S. 563, 572-73 (1968). However, in Special Verdicts I, II and III, the jury determined that Plaintiff had proved by a preponderance of the evidence the statements in question did not in any way interfere with the proper performance of either Plaintiff's or other employees' duties or with the regular operation of the school generally. Therefore, we find the statements in issue to be protected by the First Amendment. See, *Acanfora, v. Board of Education of Montgomery County*. 491 F.2d 498 (4th Cir. 1974).

The jury determined that Defendants DiNino and Hopper violated Plaintiff's First Amendment rights by suspending her, transferring her, and recommending non-renewal of her contract because she made the statements in question. The jury also found that the Board of Education acted for no reason other than the recommendation of the superintendent, Dr. Hopper. The question remaining is

whether the School District is liable in such circumstances. See p. 8, *infra*.

Liability of Mr. DiNino, the Principal, and Dr. Hopper, the Superintendent

Although the jury found that both Mr. DiNino and Dr. Hopper were motivated by constitutionally impermissible reasons in their participation in the suspension, transfer and nonrenewal, the jury also found in Special Verdict VI that they acted in good faith.

Thus, the jury determined that these individual Defendants acted sincerely and with a belief that they were doing right and that their conduct was justified by an objectively reasonable belief that it was lawful. *Gomez v. Toledo*, 446 U.S. 635 (1980). They found no malicious intention to deprive Plaintiff of her constitutional rights and they found that Defendants did not know and should not reasonably have known that their actions would violate her constitutional rights. The law provides immunity from personal liability under such circumstances. *Wood v. Strickland*, 420 U.S. 308 (1975). Therefore, judgment should be entered in favor of Defendants DiNino and Hopper on all issues relating to them.

Liability of the School District For the Suspension and Transfer of Mrs. Rowland

Defendant School District claimed that it cannot be held liable under the theory of *respondeat superior*, which it claims is the only theory applicable on the facts of this case. Defendant argued that a school district may only be held liable for the acts of its board of education, citing *Stoddard v. School District No. 1*, 590 F.2d 829 (10th Cir. 1979), and that the Board of Education did not act to suspend or transfer Plaintiff, and had no authority over the Superintendent when he acted to suspend and transfer her.

The Court in *Stoddard* stated that "[t]he only way the School District can act is by and through its Board of

Trustees." 590 F.2d at 835. However, that statement was made in reference to the facts of that case, which involved the nonrenewal of a teaching contract. The *Stoddard* case did not involve actions by a superintendent such as suspension and transfer. We agree that the only way a school district can act on nonrenewal is through its board. But we believe a school district may also be liable for the acts of its superintendent taken within the sphere of his policymaking or decisionmaking authority. See p. 10, *infra*. On the other hand, a school district may not be held liable simply because it employed a "tortfeasor" who acted within the scope of his authority. There must be more than an employer-employee relationship to justify liability

The evidence shows that, as Superintendent of the School District, Dr. Hopper had the power to make policy decisions within his sphere of authority. He had the discretion to suspend and to transfer teachers and other certificated personnel. He ordered the suspension and transfer of Plaintiff after advising the Board of Education of the problem he faced and after consulting the School District's attorney. The uncontradicted evidence, as stated in the testimony of Mr. DiNino, Dr. Hopper, and Board members Dunham, Dunkle and Bell is as follows:

On December 4, 1974, Mr. DiNino met with Mrs. Rowland and told her that revealing her sexual orientation to others could result in her position being in jeopardy. He gave her the alternative of resignation. On December 5, 1974, Dr. Hopper met with the Board of Education. He told them that he had a vocational guidance counselor at Stebbins High School who had informed staff members she was bisexual. He told the Board members that one course of action he might take was to suspend her. They all agreed he should not act until obtaining "advice of counsel."[5]

[5]Although Mssrs. Dunkle and Bell claimed at trial that they did not have all this information, they admitted having testified in depositions taken in 1975 to receiving such information. Such prior inconsistent statements are admissible as substantive evidence under Rule 801(d)(1), F.R.E.

Dr. Hopper spoke to School District attorney Larry Smith by telephone on several occasions and met with him in person on December 9,1975 before meeting with Plainiff. Mr. Smith advised Dr. Hopper to suspend Plaintiff with pay. Dr. Hopper sought and obtained this advice from the School District's attorney with the knowledge and consent of the School Board. It was the School District's attorney who informed Plaintiff she was suspended with pay, and not Dr. Hopper. Attorney Smith stated at trial that, in suspending Mrs. Rowland, he was representing the Board. He also stated: "I was speaking on behalf of an agent of the Board." He testified that Dr. Hopper had indicated to him several times in December, 1975 that he wanted Mrs. Rowland "physically gone" from the school.

Our review of the record indicates that there is a dearth of evidence concerning the School Board's role in the transfer of Plaintiff. After Plaintiff was returned to work at the high school by order of the District Court, Dr. Hopper talked with Mr. DiNino and then ordered her transferred to a position with no student contact in an annex to the high school. A new job was created for her to perform. The jury determined that this action was taken because she was homosexual or bisexual and because she had told others of her bisexuality. Dr. Hopper informed the Board members of the transfer after it was accomplished.

It is clear that Dr. Hopper was acting on behalf of the School District, with the knowledge of the School Board and on the advice of the School District's counsel, in suspending Plaintiff. Although the evidence is silent as to whether Dr. Hopper acted on advice of counsel with knowledge of the School Board in transferring Mrs. Rowland, we believe it is fair to conclude, under the circumstances, that he was acting on behalf of the School District. Therefore, the School District should be held liable for his actions.

Furthermore, we believe that the School Board is liable for the acts of an executive official, such as Dr. Hopper, which are undertaken within the sphere of his authority as

a policymaker or decisionmaker. In *Owen v. City of Independence, Mo.*, 445 U.S. 622, (1980), the Supreme Court had occasion to discuss why municipal corporations are not accorded the same good faith immunity as are their officials. The Court noted that the doctrine of official immunity rested on three rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his office, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good; and (3) the fear that the threat of personal liability might deter citizens from holding public office. See, *Wood v. Strickland*, 420 U.S. 308 (1975) and *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974)

The Court then concluded that none of these rationales apply when liability is placed upon the municipality. The Court found that:

> [i]need, a *decisionmaker* would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one comentator aptly put it: "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals affected by his actions. To criticize Section 1983 liability because it leads *decisionmakers* to avoid the infringement of constitutional rights is to criticize one of the statutes *raisons d'etre*." (Citation omitted).

Owens v. City of Independence, Mo., 445 U.S., at 656. (Emphasis added).

We believe our reading of *Owen* to be consistent with the Court's statement in *Monell v. New York City Department of Social Services*, 436 U.S 658, 692, that a governmental body may not be held liable solely on the basis of an employer-employee relationship. There the Court also held:

> [I]t is when the execution of a government's policy or custom, whether made by its lawmakers *or by those whose edicts or acts may be fairly said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. New York City District of Social Services, 436 U.S., at 694. (Emphasis added, footnote omitted).

The intent of the Supreme Court to focus liability on the governmental body in cases such as this is shown by its reference to the "principal of equitable loss-spreading" as a factor in distributing the costs of official misconduct:

> We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell v. New York City Dept. of Social Services*, 436 U.S. at 694.

Owen v. City of Independence, Mo., 445 U.S., at 657-58.

We believe that Dr. Hopper, as Superintendent of the School District, acted in a decisionmaking capacity with regard to Plaintiff's suspension and transfer for the purpose of focusing liability upon the School District for his actions, which violated Plaintiff's rights to equal protection of the law and free speech.

Liability of the School District For the Non-Renewal of Plaintiff's Contract

The jury found that the Board itself did not discriminate against Plaintiff. In Special Verdict V, the jury stated that Plaintiff had failed to prove by a preponderance of the evidence that the Board of Education, in voting not to renew Plaintiff's contract, treated her any differently than similarly situated employees because she was homosexual or bisexual. Therefore, the Board of Education did not violate Plaintiff's right to equal protection of the law. The remaining question is whether the School District violated Plaintiff's First Amendment rights by not renewing her contract.

Defendant School District argues that, since Plaintiff had no right to have her contract renewed under Ohio law, and since the Board of Education had the power to vote not to renew for no reason at all, there can be no liability for nonrenewal. The Supreme Court considered this claim in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The Court held that "[e]ven though (a teacher) could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him (citation omitted), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann*, 408 U.S. 593 (1972)." 429 U.S., at 283-284.

Defendant also argues that the School District is not liable for its Board acting upon Dr. Hopper's recommendation on the theory of *respondeat superior*. We agree, because in recommending to the Board that Plaintiff's contract not be renewed. Dr. Hopper was not acting in a policymaking or decisionmaking capacity. *See, Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). However, we believe the Board itself acted in violation of Plaintiff's

First Amendment rights. The uncontradicted facts regarding nonrenewal are as follows:

Between the time Plaintiff was suspended and the time the Board met to vote on contract renewals for the next term, the Board did not meet to discuss Mrs. Rowland on advice of counsel because litigation was in progress. In April 1975, the Board of Education met to vote on the nonrenewal of contracts of thirteen persons, including Plaintiff. At this time, all of the Board members were aware that Mrs. Rowland was the vocational guidance counselor whom Dr. Hopper had previously advised them had told staff members of her bisexuality and they were aware Dr. Hopper had wanted her removed from the school for this reason. (See p. 8, *supra*). Therefore, the Board's action in voting not to renew was based upon the same constitutionally impermissible reason as Dr. Hopper's recommendation: Plaintiff's exercise of her rights under the First Amendment.

In Special Verdict VII, the jury determined that the Board of Education knowingly and intentionally voted not to renew Plaintiff's contract and that it did not act on any reason other than Dr. Hopper's recommendation. Because the Board was well aware of the reasoning for the Superintendent's recommendation from their previous discussions with him and because they acted on that reasoning and no other, the constitutionally impermissible reasoning became the basis for the decision by the Board members. *Hickman v. Valley Local School District Board of Education*, 619 F.2d 606, 610 (6th Cir. 1980). Therefore, the School District is liable for whatever damages resulted from the nonrenewal of Plaintiff's contract.

Conclusion

In this case, Defendants conceded that a person who is homosexual or bisexual may be capable of performing properly as a high school guidance counselor. They argued

that Mrs. Rowland was not fit to be a guidance counselor because of her statements, her actions and her mode of dress. They claimed that she was a "free spirit" who had embarked on an "uncharted course" and was operating in an unconventional manner.

Although the jury had no occasion to decide whether homosexuality or bisexuality alone impairs the performance of a high school guidance counselor, their verdict and this Court's ruling on the law does say something regarding unconventional behavior in a public school setting. Where such behavior does not interfere with the performance of one's duties or with the operation of the school, the school district and its officials may not take disciplinary against the person exhibiting such behavior. Apparently the jury felt, as does the Court, that in our public educational system, which should have as one of its highest values the free expression of thoughts and ideas, there is room for the "free spirit", the unconventional person who marches to the beat of "a different drummer".[6]

Although no court has yet ruled on the specific issues set forth in this opinion, we believe that such a person has the constitutional right to be different; to express her innermost personal thoughts, her doubts, her fears, her insecurities, her likes, and her loves to fellow workers and friends so long as she does not impede the performance of the public school function. The fact that these expressions may be repugnant to some, and shocking to others is of no consequence in and of itself.

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not

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[6]"If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away." H.D. Thoreau.

> absolute, (citation omitted), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest, (citations omitted). There is no room under our Constitution for a more restrictive view. For the alternative would lead to standarization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

Dated: October 22, 1981

ROBERT A. STEINBERG
UNITED STATES MAGISTRATE

APPENDIX D

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1343. Civil rights and elective franchise.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 or Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any

right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX E

Tr.II, 101-102:

[Testimony of Larry Smith]

Q. And at that time Mr. DeNino, Alex DeNino was the principal of the school; was he not?

A. Yes.

Q. And Dr. Hopper was the superintendent.

A. Yes.

Q. Now, do you recall a conversation with Dr. Hopper in the beginning of December of 1974 about Mrs. Rowland?

A. Around that time, yes, I recall having such a conversation.

Q. Okay. Did Dr. Hopper say at that time that he had a problem with a guidance counselor who had told other employees that she was a lesbian?

A. I think that's one of the things he said.

Q. And did Dr. Hopper say at that meeting that because Mrs. Rowland had told other employees that she was a lesbian, there would have to be some action taken?

A. Are you referring to a meeting or—

Q. Or a conversation, a conversation with Dr. Hopper.

A. I think he first called me on the telephone and related to me, among other things, that he was having a—perceived he was having some difficulty with a teacher who was identifying herself as a lesbian to other teachers. I don't know if on that telephone conversation he mentioned about her being a guidance counselor but, yes, to your question.

Q. Did he at that time indicate that some action had to be taken against that person?

A. He wanted to discuss with me, number one, could he, if he wanted to, take action; if he made the decision to take action, could he take action.

Q. And did you have further conversations with him about that?

A. I think so.

Q. Did you talk to him in person or were there other phone conversations, talking about December prior to December 9, 1974?

A. The meeting, I think, where the plaintiff is present and I'm present, Dr. Hopper's present?

Q. No, I'm talking about before that.

A. Okay. I think there was one or more telephone calls concerned with this but I don't recall whether there was more than one. There was never any meetings in person that I can recall prior to that time.

Q. And Dr. Hopper indicated that he wanted to take some action against this teacher because she was telling employees that she was a lesbian.

A. Well, I think that he wanted to take action, if he could legally take action, and that was one of the reasons given.

* * *

Tr.II, 104:

Q. And did Dr. Hopper indicate that the overriding reason for suspending Mrs. Rowland was that because she had come up to other teachers and told them about her bisexuality?

A. I don't know if I would characterize it as overriding reasons. That was one of the reasons.

Q. Okay. I want to refresh your memory with a deposition that I took a couple of days ago and this has to do with that particular meeting. It's at page 19, and I want to go

through a sequence, see if you recall it. "Did he, Dr. Hopper, say what he wanted you to say?" Answer, "I'm not sure. I think he outlined to me, again, the reasons he wanted her suspended, but I'm not sure he said you'll give them these reasons." Do you recall that response?

A. Yes.

Q. And the next question, "What reasons did he give for why he wanted her suspended?" Do you recall that question?

A. Yes.

Q. Do you recall the answer? "Well, the overriding reason, as I recall—that is a difficult question for me to answer for this reason. Looking back on it, I can recall, tell you what his overriding reason was. Whether or not I interpreted the overriding reason is another matter. He told me at that meeting that she was a guidance counselor and that she had—I don't recall his exact words—but the impression in my mind is that she's accosting other teachers concerning her bisexuality or homosexuality." Do you recall that statement.?

A. Yes.

Q. Okay. So was that a correct statement?

A. It was correct as to my recollection, yes.

Q. That that's the reason that Dr. Hopper gave for wanting her suspended.

MR. HAVEMANN: Objection, Your Honor.

A. I think if you read my answer, counselor, I have two reasons in there.

THE COURT: Overruled.

Q. Okay.

A. And I recall distinctly, at least, two reasons. One that—

Q. One—

A. —she was a guidance counselor—

Q. That's right. Okay. And the second one was that she was accosting other teachers concerning her bisexuality or homosexuality.

A. Yes, those are the reasons I recall.

Q. And those are the reasons he gave for wanting her suspended?

A. Those are the reasons I recall, yes.

• • •

Tr.II, p 110:

Q. Now, did you then after Mrs. Rowland refused to resign tell her that she was suspended with pay?

A. Yes.

Q. And did you tell her and the others who were there that you were suspending her because she was telling female staff members that she was homosexual?

A. To the best of my recollection, that's one of the things I said, yes.

• • •

Tr.III, 632-33:

[Testimony of Dr. Hopper]

Q. The question—the question is whether you told him that you were concerned because there was a guidance counselor who was revealing her sexual orientation, telling staff members that she's bisexual.

A. I was concerned that she might have been confronting staff members with it.

Q. And you told him that you were concerned with that fact; isn't that correct?

A. That she was confronting other staff members with her bisexuality.

* * *

Tr.III, 560:

[Testimony of Mr. DiNino]

THE COURT: You made the statement during your testimony that you felt that the knowledge in the school—due to the knowledge in the school of Mrs. Rowland's bisexuality, she was no longer effective as a counselor. Is that a fair—

THE WITNESS: Your Honor, I'm not sure that I said she was no longer. I was making a judgment that she conceivably could not be—could conceivably be ineffective when knowledge became—

THE COURT: She could be ineffective. I don't what to put words in your mouth.

THE WITNESS: But I believe that's—that was my feeling.

THE COURT: I'd like to know what your reasoning is because this is going to be an important question in this case as to why you felt that she would not or might not be effective under those circumstances.

THE WITNESS: Well, I know that 1974-1975—even today, even though the public is more tolerant of homosexuality, I believe that many people, students as well as teachers, had an adverse view of that and would conceivably take their own personal values and not refer or not want to be counseled. I do, in fact, know at least one teacher who said that she would very unlikely refer students to her.

* * *

Tr.II, 336, 337:

[Testimony of Marjorie Rowland]

Q. And what did Mr. DiNino say?

A. He said he'd be happy to talk to me about it, come on in, have a seat and I did. He did confirm that he had talked with—I'm not sure he talked directly with Mrs. Monell, but Mrs. Monell had talked with Mr. Lane and that he had talked with Mr. Lane and I remember he didn't ask me whether it was true or not. And I didn't say whether it was true or not. He just said he had talked with these people and they had told him that I was bisexual and that he personally did not have any trouble with that part of me, that it was fine with him personally if I were bisexual, but that as an administrator, he was concerned about it.

And he said in addition if I had been a classroom teacher where I was in the front of the room and there were students out there, there would be no problem with it and he wouldn't take any action but since I was a counselor and since I saw students one-to-one, he was concerned about it and that combination of my being bisexual and a counselor could not work at Stebbins and that he would be taking some action.

Q. He indicated what action he would or might take?

A. Yes, he did. He said he at that time was doing some checking, some investigating. He didn't indicate what—that it was legal, whatever. He just said that he was doing some investigating but that he would be asking for my resignation, he would be—he said he would give me the opportunity to resign. He said he didn't want to have to dismiss me and have a black mark on my record. He would give me the opportunity to simply resign.

* * *

Tr.II, 411:

Q. Well, I was just reading from my notes and I thought that's what you said, that he had no personal concern that you were bisexual.

A. That's what he (Mr. DeNino) said.

Q. It was the fact that you were a guidance counselor and that he had received certain information.

A. It was his estimation (Mr. DeNino's) that it wasn't appropriate for me to be bisexual and working as a guidance counselor at Stebbins.

* * *

Tr.II, 333:

[Testimony of Marjorie Rowland]

One was because I was in a new relationship. I had started a new relationship recently, and I was very—I was feeling very good about it and it was very difficult to hide. People came into the faculty lounge all the time and talked about the dates they had the night before and this kind of thing and I think it's a similar thing.

* * *

Tr.II, 76:

[Testimony of Mr. DiNino]

A. Again, the reason (for the suspension), as I understood it, was because of the revelation of her homosexuality and the disruption in the school.

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CLERK

84-532

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

MARJORIE H. ROWLAND

Petitioner,

vs.

MAD RIVER LOCAL SCHOOL DISTRICT,
MONTGOMERY COUNTY, OHIO
A PUBLIC BODY CORPORATE

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Sixth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

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I. QUESTIONS PRESENTED

A. Whether the Decision Of The Court of Appeals Conflicts With Applicable Decisions Of This Court Regarding Whether Petitioner's Speech Involved Matters Of Public Concern

B. Whether the Decision Of The Court Of Appeals Conflicts With Applicable Decisions Of This Court Regarding Whether Respondent's Employees Violated Petitioner's Right To Equal Protection

C. Whether the Decision Of The Sixth Circuit Conflicts With Applicable Decisions Of This Court Regarding The "But For" Standard of Mt. Healthy v. Doyle

D. Whether the Sixth Circuit Decision Conflicts With Applicable Decisions Of This Court, Or Decisions Of Other Federal Courts Of Appeal, Regarding The Liability of Government Employers For Unconstitutional Acts Committed By Key Decision Makers Who Were In The Process of Carrying Out Official Policies

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II. STATEMENT OF THE CASE

Plaintiff-Petitioner, Rowland (hereinafter "Petitioner"), began working for Defendant-Respondent, Mad River Local School District, Board of Education (hereinafter "Respondent") as a guidance counselor in the vocational education department at Stebbins High School in Dayton, Ohio, in August, 1974, (Tr. II, 289). Petitioner was employed under a one year limited contract that would expire at the end of the school year (Tr. II, 476-477). Petitioner's office was located within the vocational education department and Petitioner jointly shared with other staff members of the department a secretary by the name of Elaine Monell (Tr. II, 308; Tr. III, 381).

In October or November, 1974, Petitioner had a discussion with Monell wherein Petitioner named one of her student counselees as being gay (Tr. II, 314, 320; Tr. III, 406-410). On November 26, 1974, Monell was working at her desk, typing, when Petitioner approached her and told her that she was bisexual and had a female lover. Petitioner also identified by name a second student counselee who was homosexual. Monell was upset, did not want to be confronted with that information, and, according to Petitioner, Monell became cold and distant. Monell told the department supervisor about her conversation with Petitioner. On the following day, Monell talked with the school principal, Defendant, DiNino, about the same situation (Tr. II, 176, 409-411, 419; Tr. III, 390-391, 490-492; Tr. IV, 132).

During this same time period, and in the vocational education office, Petitioner had a confrontation with a parent and student counselee because Petitioner had told the student it was okay to be gay. The parent was upset with Petitioner and told Petitioner that it was not okay,

that it was wrong, against the bible, and asked Petitioner why she told the student that it was okay (Tr. II, 321, 328-330, 495-496, 507-508). In addition, Petitioner told the assistant principal of the school, Goheen, and several teachers who were personal friends that she was bisexual.

In December, Petitioner had a meeting with DiNino, and he suggested that she resign. Petitioner refused to resign, and then told several other Stebbins teachers that she had been asked to resign because she was bisexual, and Petitioner solicited their support (Tr. II, 338-350).

DiNino then reported his conversations with Petitioner to Defendant, Hopper, the local school district superintendent. Shortly thereafter, Hopper informed some members of the Respondent simply that Hopper had some type of problem in the high school and would have to take some action or discipline a faculty member. Hopper did not say that he was going to suspend or remove the faculty member (Tr. II, 69, 89-98, 210, 222-223; Tr. III, 5-6, 566-571). A few days later, Petitioner, with her attorney, met with DiNino, Hopper, and the School District's attorney, and again Petitioner refused to resign. Thereupon, at the decision of Hopper, Petitioner was suspended with full pay for the remainder of her contract (Tr. II, 72-74, 109-112, 143-144, 342-344).

Petitioner then filed the first of two actions in District Court. The District Court entered a preliminary injunction against the suspension and thereafter, Hopper reassigned Petitioner to a position involving development of a career education curriculum. This was a position with no student contact (Tr. II, 184-185, 223; Tr. III, 642-643). As was the case with the suspension, the decision to transfer Petitioner was made by Hopper. That is, the members of the Respondent Board of Education were informed by

Hopper of the transfer after it was an accomplished fact; Hopper gave the members of the Board no reason for the transfer other than that it was his right, authority and prerogative; and the Respondent Board took no action whatsoever (Tr. II, 98, 227; Tr. III, 9-13, 643).

In March, 1975, DiNino recommended to Hopper that the contract of Petitioner, along with the contract of several other Stebbins teachers not be renewed. The local superintendent, Hopper, concurred, and, in turn, recommended to the county superintendent, Crim (who was not made a party to any action), that Petitioner's contract, and the contracts of several other Stebbins teachers, not be renewed. Petitioner was informed of the recommendation and, at a regular meeting of the school board, the Respondent, Board of Education, received from Crim and Hopper a recommendation to not renew the contracts of several Stebbins teachers, including the contract of Petitioner, and no reasons for the recommendation were given. At that meeting of the Respondent, Board of Education, the recommendation to not renew the contracts of employment was unanimously adopted without independent investigation (Tr. II, 96-97, 208, 217, 220; Tr. III, 13-14, 516, 589, 645-646).

Petitioner filed a second action in the District Court charging that the reassignment and failure to renew her contract violated a number of constitutional rights. The Defendants in both actions were the Respondent, Board of Education, the president and members of the Board, the local superintendent of the school district, and the principal of Stebbins High School. A jury trial was conducted by a U.S. Magistrate, but the jury's role was limited to responding to special verdict questions submitted to it by the Magistrate. In Special Verdicts I, II and III, the jury found that Petitioner's statement to Monell

that she was bisexual and had a female lover and Petitioner's statements to Goheen and fellow teachers regarding her bisexuality, did not interfere with the proper performance of Petitioner's duties, Monell's duties, the teachers' duties, or with the regular operation of the school generally (A-22a-27a). In Special Verdict V, the jury found that Hopper and DiNino treated Petitioner differently than similarly situated employees because Petitioner was homosexual/bisexual; however, the Respondent, Board of Education, did not treat Petitioner differently (A-28a). In Special Verdict VII, the jury found that the Respondent, Board of Education, when it voted to non-renew Petitioner's contract, did not act for any reason other than the recommendation of Hopper (A-31a). In Special Verdict V, the jury also found that Petitioner was not performing her job in a satisfactory manner at the time of her suspension because she revealed the sexual orientation of two students when it was not necessary to do so (A-29a, 32a).

On the basis of the jury's answers to the Special Verdicts, the Magistrate dismissed all defendants from the action except Respondent, Board of Education. The Magistrate entered orders finding the Respondent, Board, liable for violations of Petitioner's rights of free speech and equal protection under the United States Constitution and judgment was entered in the amount of $55,-973.14. Although Petitioner had requested reinstatement and the expungement of the Respondent's records regarding numerous deficiencies and complaints about Petitioner's job performance (in addition to the disclosure of the sexual orientation of two students), the Magistrate refused to order such relief. The Magistrate found that the evidence introduced at trial substantiated the accuracy of the Respondent's records and further established

that Petitioner was unwilling to follow the policies and directives of school administrators. (Order regarding Plaintiff's request for prejudgment interest, etc., p. 6-7, R. 82).

III. ARGUMENT

A. The Decision Of The Court Of Appeals Does Not Conflict With Applicable Decisions Of This Court Regarding Whether Petitioner's Speech Involved Matters Of Public Concern

While Petitioner did, in fact, do some speaking to Monell, Goheen, and other employees at Stebbins High School, Petitioner's speaking was not the type of speech contemplated by *Connick* v. *Myers*, ____ U.S. ____, 103 S.Ct. 1684 (1983); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979); *Mt. Healthy City School District, Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Perry* v. *Sinderman*, 408 U.S. 593 (1972); and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). In *Givhan*, supra, at 414, this Court approvingly discussed *Pickering*, supra, and noted the standard to be applied in evaluating the speech of a public employee:

> "In determining whether a government employee's speech is constitutionally protected, the interests of the [employee], as a citizen, in commenting upon matters of public concern must be balanced against the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."

All of the above cases involved comments being made upon public issues and matters of public concern—not comments upon matters which were entirely personal to the speaker and not at all relevant to any matter of public

concern or controversy and not at all relevant to any educational purpose.

In *Connick* v. *Myers*, supra, this Court discussed the importance of first determining whether or not the speech involved matters of public concern. The opinion in *Connick* v. *Myers*, supra, at 1689 noted that, if a public employee's statements cannot be fairly characterized as constituting speech on a matter of public concern, then it is unnecessary for the courts to scrutinize the reasons for discharge. Thus, if the "speech" does not involve matters of public concern, there is no need to engage in a *Pickering* type of analysis. The essence of the Court's holding appears at 1690 of the opinion:

> "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

Furthermore, this Court's opinion in *Connick*, at 1690, specifically set forth the criteria to be used by the courts in determining the public or private nature of an employee's speech:

> "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement as revealed by the whole record."

An examination of the opinion of the Sixth Circuit in the case at bar, *Rowland* v. *Mad River Local School District*, 730 F.2d 444, at 449 (6th Circuit, 1984), demonstrates that, in fact, the *Connick* criteria was followed and the

Sixth Circuit determined that Petitioner's statements did not address matters of public concern. As noted by the Sixth Circuit, Petitioner's speech involved only her own personal interests and there was no evidence of any public concern in the community or at Stebbins High School regarding the issue of bisexuality among school personnel when Petitioner began speaking to others about her own sexual preferences.

While Petitioner now claims that the Sixth Circuit's analysis is incorrect and that her speech did involve a matter of public concern, even the Magistrate at the trial level indicated otherwise. At the trial level, the Magistrate ruled from the bench regarding liability on the First Amendment and found as follows:

> "In this case, we don't have the advocacy of ideas in a public forum. We have the private statement of personal feelings by one individual to another in the employment setting." (Tr. IV, 422-423).

At page 6 of her Petition, Petitioner argues that the Sixth Circuit ignored this Court's decision in *Givhan* v. *Western Line Consolidated School District* , supra, as distinguished by this Court in *Connick*, supra, at 1691, n.8. However, Petitioner's reference to the footnote in *Connick* does not assist her cause. As noted in that footnote, *Givhan* was a case where an employee was speaking out on matters of general concern, not on matters regarding a personal employment dispute. Furthermore, to paraphrase and adapt portions of that footnote to this case, it can be said that Petitioner's statements not otherwise of public concern do not attain that status because the subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest. Petitioner's analysis of whether her statements if characterized as protests, etc., could be

matters of public concern is beside the point—it does not answer whether the statements involved in this particular case constituted such speech. Contrary to the contentions of Petitioner, her statements were not aimed at social and legal change—rather they were simply aimed at various school employees with the hope that the conversations would remain confidential (hardly a method to initiate social and legal change).

The essence of Petitioner's argument regarding whether her statements constituted speech involving a matter of public concern is found at pages 10 and 11 of the Petition. Therein, Petitioner asserts that this Court should grant *certiorari* in order to provide guidelines on what constitutes matters of public concern. However, this Court has already set forth those guidelines—they are contained within the *Connick* opinion at 1689-1690. Certainly, this is not an issue which deserves further elucidation by this Court. Petitioner does not complain that the Sixth Circuit applied the wrong test; Petitioner merely complains that the application of that test to the facts of this case result in a determination that Petitioner's statements do not happen to constitute speech involving matters of public concern. Such contention should not form the basis for granting a writ of *certiorari*.

B. The Decision Of The Court Of Appeals Does Not Conflict With Applicable Decisions Of This Court Regarding Whether Respondent's Employees Violated Petitioner's Right To Equal Protection

1. The decision of the Sixth Circuit did not fail to apply the "clearly erroneous" rule in determining that Petitioner was not treated differently than similarly situated employees.

At trial, the Magistrate correctly observed that there was absolutely no evidence in the record to support an equal protection claim (Tr. III, 620), and that there was

absolutely no evidence of any similarly situated employees having a work record comparable to that of the Petitioner (Tr. IV, 352-353). It is a fact that one can search in vain for any evidence in the record in this case regarding any employee who had a work record comparable to that of the Petitioner. Thus, it was improper for the Magistrate to submit such issue to the jury for speculation.

The Sixth Circuit, having the entire record before it, agreed with the Magistrate's analysis regarding the lack of evidence. The Sixth Circuit in *Rowland* v. *Mad River Local School District*, supra, at 450 correctly observed that, at trial, the Magistrate "required the jury to make findings on an issue which he recognized as having been the subject of no proof. This was plain error. Since Plaintiff failed to produce any proof that she was treated differently from other similarly situated employees, there was nothing to submit to the jury on this issue."

Petitioner, at page 15 of the Petition, argues that the Sixth Circuit could not have applied the "clearly erroneous" standard and at the same time concluded that there was no appropriate evidence on the issue because the transcript is replete with testimony regarding the concerns of Hopper and DiNino regarding Petitioner's homosexuality. Petitioner, in her brief, then proceeds to refer the Court to various portions in the transcript where her homosexuality was discussed.

Nevertheless, that does not supply the evidence which the Magistrate and the Sixth Circuit found lacking. For example, the references to the transcript made by Petitioner in her brief are taken out of context and certainly cannot be considered a representation of "the totality of the evidence" for purposes of the clearly erroneous rule. In fact, the totality of the evidence indicates that the concerns regarding Petitioner's homosexuality were al-

ways in conjunction with Petitioner's numerous job deficiencies. For example, the evidence in the case at bar established that Petitioner had received several oral and written reprimands from the vocational education department supervisor regarding numerous shortcomings and deficiencies in Petitioner's performance—most of which took place before anyone had knowledge that Petitioner was bisexual/homosexual (Tr. III, 352-377; Ex. C.). As noted above, the Magistrate, after finding Respondent, Board of Education, liable to Petitioner for constitutional violations, nevertheless declined to expunge the Respondent's records regarding the numerous deficiencies and shortcomings in Petitioner's job performance because those records were, in fact, supported by the evidence at trial. In addition, of course, the jury indicated that Petitioner was not performing her job in a satisfactory manner in that she had breached her obligation of confidentiality toward her student counselees. Petitioner herself recognized that her student counselees deserved an absolutely confidential situation (Tr. II, 299-300). Indeed, her position as guidance counselor was such that the maintenance of confidentiality was absolutely crucial to her utility, future functioning, and effectiveness (Tr. III, 200, 219). Certainly, an examination of the record in this case clearly demonstrates that there was absolutely no evidence of any employee "similarly situated" to Plaintiff regarding job performance.

It is particularly significant to note that the Magistrate, at trial, observed:

> "I think that in order to prove discrimination, the Plaintiff has to prove that she was performing her job properly and then was fired or action was taken for no apparent legitimate reason.
>
> If you fail to prove that you are performing your job properly, I don't think you have made a *prima facie* case of discrimination." (Tr. IV, 203).

There can be no doubt that Petitioner did not perform her job properly. Such was the finding of the jury and the Magistrate.

Petitioner's arguments would lead one to believe that the decision of the Sixth Circuit regarding the discrimination issue in this case was an aberration. However, that is not the case. The Sixth Circuit accurately summarized Petitioner's evidence on her equal protection claim, as well as the basis for its holding as follows:

> "[As] we have pointed out, the Plaintiff sought to prevail on her equal protection claim without any showing that heterosexual school employees in situations similar to hers have been, or would be, treated differently for making their personal sexual preferences the topic of comment and discussion in the high school community. Again, this is nothing more than the required analysis of an equal protection claim." *Rowland* v. *Mad River Local School District*, supra, at 451-452.

2. The decision of the Sixth Circuit does not involve the ability of a party to prove discriminatory motive by direct evidence, and therefore certiorari should not be granted on an issue not passed upon by the Court below.

In light of the foregoing, Petitioner's arguments regarding direct evidence of discriminatory motive (see Petition, pages 16-19) are simply irrelevant. For example, assuming *arguendo* discriminatory motive can be established by direct evidence, as well as circumstantial evidence, that does not necessarily establish that discrimination did in fact take place. An employer might have all the desire in the world to engage in discrimination, but if in actuality all his employees are paid the same and otherwise subjected to the same working conditions, no claim of discrimination can be maintained.

The foregoing demonstrates the essential failure of Petitioner's argument on this issue: case precedents which set forth a method of proving discriminatory motive merely set forth a method of proving one element of a discrimination case, i.e. motive; however, proof of discriminatory motive does not prove an entire case of discrimination. Thus, the Court should refrain from granting *certiorari* in order to "reaffirm" a doctrine that discriminatory motive can be established by direct as well as circumstantial evidence.

Most Certainly, this Court should refrain from granting *certiorari* to "reaffirm" a doctrine that discriminatory motive can be proved by direct evidence when the Sixth Circuit has done nothing to impair such a doctrine.

3. The Sixth Circuit, in its decision below, did not pass upon the issue of whether or not homosexuals/bisexuals are protected by the equal protection provisions of the Fourteenth Amendment, and therefore certiorari should not be granted for such an issue.

Similarly, it is respectfully submitted that this Court should not grant *certiorari* simply in order to decide whether or not homosexuals/bisexuals are protected by the equal protection provisions of the Fourteenth Amendment. The opinion of the Sixth Circuit in this case has not ruled on whether or not homosexuals/bisexuals are protected by the equal protection provisions of the Fourteenth Amendment. Thus, there is really nothing for this Court to review on that issue. In fact, it is somewhat surprising that Petitioner wishes the Court to grant certiorari on this issue when, in her brief before the Sixth Circuit, Petitioner repeatedly stated that the evidence established that the suspension, reassignment and nonrenewal were caused by Petitioner's speech and not her

sexual preference, and indicated that the Sixth Circuit need not address the issue of whether or not sexual preference is constitutionally protected:

> "[P]laintiff's exercise of her right to free speech in [the circumstances of this case] cannot, consistent with the First Amendment, be the basis for [the school board's] actions. As plaintiff's speech was in fact the only reason for those actions, plaintiff is entitled to an affirmance of the District Court's judgment.
>
> ***The simple fact is that, as school officials unanimously testified below, [the school board's] actions were caused by plaintiff's speech and not by her sexual preference." (Brief of Plaintiff-Appellee, page 22, as filed with the Sixth Circuit).
>
> "Appellant, [the school board] *in the district court*, expressly disavowed plaintiff's sexual preference as a basis for its actions. ***There is therefore no reason for this Court to consider the purely hypothetical question of whether Appellant could have suspended, transferred or refused to renew Plaintiff purely because of her sexual preference." Id, p. 44.

Furthermore, Petitioner should not be permitted to assert that homosexuality is included within the right of privacy when, as the Sixth Circuit noted below, the case was submitted at trial on claims of free speech, equal protection, and access to the courts. Certainly, Petitioner should not be permitted to raise a new theory for the first time in this Court.

Finally, it is respectfully submitted that this Court has, by its previous rulings, provided sufficient direction regarding homosexual rights and the equal protection clause. E.g. *Doe* v. *Commonwealth's Atty.*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901 (1976), reh.den. 425 U.S. 985; *Baker* v. *Nelson*, 291 Minn. 310, 191 N.W.2d

185 (1972), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972); also see, *Zablocki* v. *Redhail*, 434 U.S. 374, 398-399 (1978) (Powell, J., concurring in judgment); *Poe* v. *Ullman*, 367 U.S. 497, 546, 553 (1961) (*Harlan*, J., dissenting). As previously noted by this Court, the Fourteenth Amendment simply does not give federal courts the power to impose upon the states their version of what constitutes wise social policy. *Dandridge* v. *Williams*, 397 U.S. 471, at 485 (1970), reh. den. 398 U.S. 914.

C. The Decision Of The Sixth Circuit Does Not Conflict With Applicable Decisions Of This Court Regarding The "But For" Standard Of *Mt. Healthy* v. *Doyle*

It is respectfully submitted that *certiorari* should not be granted in order to determine whether or not the Sixth Circuit decision is in conflict with the "but for" standard set forth in *Mt. Healthy City School District, Board of Education* v. *Doyle*, supra. As the Sixth Circuit decision clearly indicates, its analysis on the "but for" test was not a determinative issue. That is, the Sixth Circuit merely indicated that "even if there were no other grounds for reversing the equal protection award, it would be necessary to remand for a proper *Mt. Healthy* determination." *Rowland* v. *Mad River Local School District*, supra, at 450. After making that observation, the Sixth Circuit went on to hold that, for reasons other than *Mt. Healthy* and the "but for" test, the judgment entered by the Magistrate would be reversed and the action against Respondent dismissed.

Furthermore, contrary to the assertions of the Petitioner, the Sixth Circuit decision does not conflict with this Court's holding in *Mt. Healthy*. To the contrary, the Sixth Circuit decision follows that holding. As the Sixth

Circuit noted, the Magistrate improperly omitted from Special Verdict VIII the matter of Petitioner's unsatisfactory job performance, and improperly combined in a single special verdict references to Petitioner's exercise of speech and sexual preference. Thus, the jury's response to Special Verdict VIII still made it impossible to tell whether or not the jury found that Petitioner was suspended and transferred for being bisexual or for talking about it. Thus, Respondent respectfully submits that it would be improvident for this Court to grant *certiorari* to "reaffirm" the holding in *Mt. Healthy* when the decision of the Sixth Circuit does not conflict with that holding.

D. The Sixth Circuit Decision Does Not Conflict With Applicable Decisions Of This Court, Or Decisions Of Other Federal Courts Of Appeal, Regarding The Liability Of Government Employers For Unconstitutional Acts Committed By Key Decision Makers Who Were In The Process Of Carrying Out Official Policies

Item F of Petitioner's questions presented for review and Petitioner's arguments in support thereof are patently misleading and inaccurate. Petitioner frames this issue as if it were established at trial that Hopper "was a policy making official and acted with the approval of the [Respondent] Board of Education". (See Petition, p. 26). That is, there is absolutely *no* evidence in the record that Hopper was a "policy maker". To the contrary, the only evidence on this issue was that the Respondent School Board itself makes policy and Hopper's job is simply to execute whatever that policy might be (Tr. III, 646-647). Furthermore, it can hardly be stated that Hopper was acting with the approval of the Respondent Board of Education, for the Magistrate indicated that "there is . . . uncontroverted testimony that the board members took

no action with respect to the suspension or the transfer" of Petitioner (Tr. III, 299).

Furthermore, the question, as framed by Petitioner, implies that Hopper was carrying out an official policy of the Respondent. However, during the jury instruction conference at trial, counsel for Respondent raised the issue of the failure of the Magistrate to submit to the jury any special verdicts or instructions in regard to the issue of whether or not any of the action of which Petitioner complained was taken in accordance with official or unofficial policy of the Respondent School Board. At that time, the Magistrate indicated that "its very clear" that there was no such policy (Tr. IV, 232-234). At no time did Petitioner object to the Magistrate's finding.

Contrary to the assertions of Petitioner, the decision of the Sixth Circuit is not in conflict with the decisions of this Court in *Monnell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978) and *Owen* v. *City of Independence, Mo.*, 445 U.S. 622 (1980). In her Petition, Petitioner completely misconstrues the holdings of this Court in *Monnell* and *Owen*. As noted in *Gilmer* v. *City of Atlanta*, 737 F.2d 894 (11th Circuit, 1984); *Magayanes* v. *City of Chicago*, 496 F. *Supp.* 812, 814 (N.D. Ill. 1980), *Owen* did not alter the basic requirement of *Monnell* that the plaintiff in a civil rights action, in order to recover against a governmental entity must establish that his injuries were the result of the execution of the government's policy or custom. Indeed, *Owen*, at 655 n.39 and at 657 reaffirmed *Monnell's* holding that a local government could not be held liable except where the government policy or custom causes the injury. In *Owen*, the governmental entity was held responsible, not on the basis of *respondeat superior*, but because in an official meeting of the city council, the council had voted on and issued

charges against a former police chief. The portion of the Court's opinion in *Owen*, upon which Petitioner apparently relies, is taken out of context. That is, the Court's discussion on decision makers (445 U.S. at 656) was contained in the Court's rationale for denying good faith immunity to local municipal corporations. Clearly, the Court was not saying that the acts of decision makers render the municipal corporation liable, irrespective of any governmental policy. Under the *Monnell* standard, the fact that a decision maker causes the injury is irrelevant unless that decision maker is executing a governmental policy or custom. To hold a governmental entity liable based solely on the fact that the injury was inflicted by a decision maker is not supported in logic or in law. That is, it is an established fact that no fictitious entity can act of its own force, it must have some employees. All those employees are, to a certain extent, vested with some power to make decisions. But this is not to say that every decision they make is in accordance with the employer's policy. Surely, if the decision maker makes a decision or takes an action contrary to established policy, then it is the decision maker and not the governmental policy that causes any injury. Similarly, if the decision maker acts upon a subject about which there is no governmental policy, any injury results from the act committed and cannot be causally related to any policy of the government. Thus, the term "decision maker" has little or no meaning—and no limitations—unless it is related to the meaning given by *Monnell*, i.e. one who *makes* government policy or custom, and, the policy having been made, is carried out and produces injury.

The evidence in this case establishes nothing more than that the local superintendent Hopper took some action which perhaps injured Petitioner. Unless Petitioner can

establish a policy or custom of the Respondent Board of Education to exclude homosexuals from employment or to discriminate against persons who exercise free speech, certainly there is no showing which satisfies *Monnell* and *Owen*. In the case at bar, on more than one occasion, the Magistrate indicated that whatever action may have been taken against Petitioner, it was not because there was a policy of Respondent to discriminate against either homosexuals or against people who exercise a right of speech (Tr. IV, 232-234, 399). Indeed, there was no evidence to support an equal protection claim in this case, and there was not even any evidence that a classification had been established (Tr. III, 620). The evidence merely shows that Hopper took some action based upon his own decision.

At page 28 of the Petition, Petitioner suggests that the decision of the Sixth Circuit is at odds with other Circuit Courts of Appeal which have decided whether or not governmental bodies are liable for unconstitutional acts committed by decision makers. *Key* v. *Rutherford*, 645 F.2d 880 (10th Circuit, 1981) and *Universal Amusement Co.* v. *Hofheinz*, 646 F.2d 996 (5th Circuit, 1981), are not relevant because they do not deal with the issue at all. Rather, they deal with the issue of the availability of the good faith defense to governmental bodies.

Similarly, the case of *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109 (5th Circuit, 1980) is not pertinent because that case involved action having been taken by the school district board of trustees itself—not some principal or superintendent or other administrative employee. The case of *Burt* v. *Abel*, 585 F.2d 613 (4th Circuit, 1978) must be questioned in light of other authorities and in light of the fact that the court's analysis on the issue is contained in a footnote, contains no citations of authority, and is quite brief. To the extent the case of

Williams v. *City of Valdosta*, 689 F.2d 964 (11th Circuit, 1982) would seem to support Petitioner's proposition, that case must be read in light of a later case from the same circuit, *Gilmer* v. *City of Atlanta*, supra, which indicates that a decision maker does not create liability upon the governmental body; liability, if any, is imposed upon the governmental body when custom has been *created or maintained* by law makers or persons whose edicts or acts may be fairly said to represent official policy—that an isolated incident does not constitute custom. Thus, the decision of the Sixth Circuit does not conflict with applicable decisions of this Court; nor does it conflict with decisions of other federal courts of appeal.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully Submitted,

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No. 84-532

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MARJORIE H. ROWLAND,
Petitioner,

v.

MAD RIVER LOCAL SCHOOL DISTRICT,
MONTGOMERY COUNTY, OHIO, A PUBLIC BODY CORPORATE,
Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION

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II. INTRODUCTION

Petitioner believes that only two of the respondent's arguments in its Brief in Opposition to the Petition for Certiorari require further discussion: the contours of municipal liability and respondent's misleading references to the transcript.

III. ARGUMENT

A. If A Policy-Making Entity Or Individual Acts So As To Violate A Citizen's Constitutional Rights, The Municipality May Be Liable.

Respondent erred in arguing that this Court's decisions in *Monell* v. *New York City Department of Social Services,* 436 U.S. 658 (1978) and *Owen* v. *City of Independence, Mo.,* 445 U.S. 622 (1980) support the holding of the Sixth Circuit Court of Appeals that the petitioner in the case at bar had to prove that the Board of Education established "a policy or custom . . . to exclude homosexuals from employment or to discriminate against persons who exercise free speech . . . ." *Brief of Respondent,* at 18.

This Court stated in *Monell, supra* that municipalities may be sued for violating 42 U.S.C. section 1983 in "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" and that "we expressly leave further development of . . . (the contours of municipal liability under section 1983) to another day." 436 U.S. at 694, 695.

This Court developed the contours of municipal liability further in *Owen, supra.* The Court held that a city could be liable for harm caused by a city council or a key decision-maker (in *Owen* the city manager) in unconstitutionally discharging a city employee. Respondent argued in its brief in opposition that *Owen* is distinguishable because, although the city manager actually discharged Owen, the city council gave the city manager authority to take ac-

tion against those whose activities came out in an investigative report. 445 U.S. at 629.

This is a distinction without a difference. In *Owen*, this Court emphasized that "(t)he innocent individual who is harmed by an abuse of governmental authority [such as a city manager or city council]" must be "assured that he will be compensated for his injury." and that damages would be "chargeable to the populace as a whole." *Id.* If the city school district were not liable for unconstitutional acts of key decision-makers, like the city manager or school superintendent, the victim would not be compensated. Furthermore, this Court in *Owen* did not require the petitioner to prove that the city or the city manager had an established practice or custom of discharging persons in violation of their Fourteenth Amendment right to Due Process. *Owen* appears to stand for the proposition that if a policy-making entity or individual acts so as to violate a citizen's constitutional rights, the municipality may be liable.

Petitioner has cited a number of decisions by circuit courts of appeals that have held that "governmental bodies that entrust key decision-makers with certain responsibilities are liable for unconstitutional acts by the decision-makers." *Petition for Certiorari*, at 28. In addition, the Fifth Circuit Court of Appeals, sitting *en banc*, recently cited with approval *Schneider* v. *City of Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980) for its holding that "where a city officer 'is the final authority or ultimate repository of [city] power his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy

for which the [city] may be held responsible under section 1983.'" *Bennett* v. *City of Slidell,* 728 F.2d 762, 766 (5th Cir. 1984) (en banc).

The Fifth Circuit Court of Appeals in *Bennett* then cited decisions in other circuits that have established the same contours of municipal liability for acts of top decision-makers as did the court in *Schneider.* See, *Rookard* v. *Health and Hospital Corp.,* 710 F.2d 41, 45 (2d Cir. 1983); *McKinley* v. *City of Eloy,* 705 F.2d 1110, 1116 (9th Cir. 1983); and *Williams* v. *City of Valdosta,* 689 F.2d 964, 969 (11th Cir. 1982). The Courts of Appeals in *Schneider, supra; Rookard, supra; McKinley, supra;* and *Williams, supra* held that cities were liable for single, unlawful discharges by officials who had been given final authority to discharge employees. None of the courts in these four cases required the plaintiff to show that the municipality had a policy or custom of discharging employees who tried to exercise their First Amendment rights or had a policy of discriminating against employees on account of their race or sex or sexual orientation. For instance, the Ninth Circuit Court of Appeals in *McKinley* stated that "the personnel decisions of the city manager represented 'official city policy'" because the city manager had the final authority over personnel decisions. *McKinley* v. *City of Eloy, supra,* at 1116. See, *Rookard* v. *Health and Hospital Corp., supra,* at 45 and *Williams* v. *Valdosta, supra,* at 969.

Although the Fifth Circuit Court of Appeals cited *Schneider, supra* and a number of related cases with approval, its language appears to severely limit *Monell, supra* and *Owen, supra.* (See the opinion of

five dissenting judges, beginning at 770.) For instance, the Court stated that "(i)solated violations are not the persistent, often repeated, constant violations that constitute custom and policy" [*Id.*, at 768, n.3], although none of the cases cited by the Court and listed above involved repeated violations of the Constitution.

Respondent cited a decision by the Eleventh Circuit Court of Appeals that also limited *Monell, supra* and *Owen, supra. Gilmere* v. *City of Atlanta,* 737 F.2d 894 (11th Cir. 1984). The Court held in *Gilmere, supra* that unless there are repeated violations of constitutional rights, a city would not be liable under section 1983. However, the Court has granted a motion for rehearing. *Id.,* at 912. Furthermore, a different panel of the same court held that an isolated violation of a constitutional right was sufficient to hold a city liable for conduct of its officials. *Trezevant* v. *City of Tampa,* 741 F.2d 336, 340 (11th Cir. 1984).

The decision by the Sixth Circuit Court of Appeals in the case at bar is contrary to most of the decisions by Courts of Appeals that have held municipalities liable for unconstitutional discharges of employees by administrators who had authority to do so. The superintendent and principal in the instant case had the final authority to suspend and to transfer the petitioner and to recommend that she be non-renewed. By suspending and transferring the petitioner because she is bisexual and because she told others of her bisexuality, the superintendent and principal made official policy of the school district and the school district is therefore liable. The peti-

tioner should not have been required to show that the school district had a practice or custom of removing homosexuals or bisexuals, as mandated by the majority of the Sixth Circuit panel. Other circuit courts have not required such an onerous showing. In fact, most of the cases that have limited *Monell, supra* and *Owen, supra* related to officials' abuse of power and did not involve the discharge of municipal employees, which is the situation in the case at bar.

In addition, respondent neglects to point out that as in *Owen* key decision-makers were not alone in violating the petitioner's constitutional rights. The respondent school district also violated her rights. The superinendent Dr. Hopper acted on behalf of the school board and on the advice of the school district's legal counsel in suspending petitioner. He consulted with the board prior to taking action (Vol. III p. 631) and informed the board after he suspended the petitioner (Vol. III, p. 638). He informed the board of the reasons for his actions. The board concurred with the superinendent's actions. Furthermore, the school board acted to non-renew the petitioner's contract, based on the recommendation of the superintendent.

Circuit Courts of Appeals have expressed their uncertainty as to the contours of municipal liability under section 1983. Even within the circuits, judges have expressed disagreement concerning the boundaries of *Monell* and *Owen*. See, the dissent of Judge Edwards in the case at bar, the order to rehear *Gilmere, supra* and the dissenting opinion in *Bennett, supra*. The instant case would give this Court the opportunity to develop further the contours of *Monell,*

supra and *Owens, supra* and to bring the Sixth Circuit into conformity with decisions of this Court and other circuit Courts of Appeals.

B. Petitioner's Transcript References To The Testimony Concerning The Reason For Her Termination Are Not Taken Out Of Context.

In section B-1 of its brief, respondent complains to this Court that petitioner's references to the trial transcript are "taken out of context and certainly cannot be considered a representation of the totality of the evidence . . ." (Respondent's brief, at 9). These portions of the transcript refer to the testimony that was given concerning the reason for Ms. Rowland's termination.

Respondent's statement that these references are taken out of context is misleading. At the time of Ms. Rowland's termination she was given one overriding reason for the respondent's action. School authorities acted because she was a bisexual guidance counselor. Other alleged concerns relating to her job performance were not mentioned or discussed. For instance, Larry Smith, attorney for the school board in 1975, testified that the overriding reason given by Dr. Hopper, the superintendent, was that she was a bisexual guidance counselor (A-57a).

Dr. Hopper's testimony was consistent with Larry Smith's version. He was concerned that petitioner was confronting staff members with her bisexuality. That was the sole motivating factor for Hopper's actions at the time (A-57a). Likewise, principal Di-Nino had concerns because petitioner was a bisexual guidance counselor (A-58a).

All of the above testimony related to the individual defendants' thoughts, conversations, and motivating factors which occurred contemporaneously with petitioner's suspension, transfer and termination. These remarks are certainly not taken out of the context of the events which are the subject of this action.

Petitioner acknowledges that at the time of the jury trial of this matter (6 years later) there was testimony by the individual defendants about other problems with petitioner's job performance. However, the evidence is undisputed that none of these concerns were communicated at the time of the petitioner's suspension or termination. The only reason given at the time was her bisexuality. The other factors mentioned by respondent all surfaced later as a *post facto* attempt to justify the termination.

IV. CONCLUSION

Petitioner requests that for all of the above reasons and those previously stated the Petition for a Writ of *Certiorari* be granted and the case be set down for argument.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

MARJORIE H. ROWLAND *v.* MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–532. Decided February 25, 1985

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

This case raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences. Petitioner, a public high school employee, "was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason." 730 F. 2d 444, 454 (CA6 1984) (Edwards, J., dissenting). Because determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts and because this Court has never addressed the issues presented, I would grant certiorari and set this case for oral argument.

I

In December 1974, petitioner was suspended from her nontenured position as a high school guidance counselor. In April 1975, the respondent school district acting through its school board decided not to renew petitioner's contract. A jury later made unchallenged findings that petitioner was suspended and not rehired solely because she was bisexual and had told her secretary and some fellow teachers that she was bisexual, and not for "any other reason." See 730 F. 2d, at 460 (Special Verdict VIII). The jury also found that petitioner's mention of her bisexuality did not "in any way in-

terfere with the proper performance of [her or other school staff members'] duties or with the regular operation of the school generally." *Id.*, at 456–458 (Special Verdicts I, II, and III). The jury concluded that petitioner had suffered damages as a result of the decisions to suspend and not rehire her in the form of personal humiliation, mental anguish, and lost earnings.

The trial judge ruled that these findings supported petitioner's claims for violation of her constitutional right to free speech under *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) and to equal protection of the laws under the Fourteenth Amendment.[1] He therefore entered a judgment for damages for petitioner.

The Court of Appeals for the Sixth Circuit reversed. The court first ruled that in light of our intervening decision in *Connick* v. *Myers*, 461 U. S. 138 (1983), the decision to discharge petitioner based on her workplace statements was unobjectionable under the First Amendment because petitioner's speech was not about "a matter of public concern." 730 F. 2d, at 451. While accepting the jury's finding that petitioner's mention of her bisexuality had not interfered "in any way" with the "regular operation of the school," the court concluded that it was constitutionally permissible to dismiss petitioner "for talking about it." *Id.*, at 450. Second, the court held that no equal protection claim could possibly have been made out, because there was presented "no evidence of how other employees with different sexual preferences were treated." *Ibid.* Without citation to any precedent, the court characterized the judgment for petitioner in the absence of such comparative evidence as "plain error."[2]

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[1] United States Magistrate Robert A. Steinberg, presiding by agreement of the parties pursuant to 28 U. S. C. § 636. His opinion is reprinted at 1 Record Appendix (Rec. App.) 97–111.

[2] This ruling overturned the jury's clear finding to the contrary that when the school principal and superintendent had suspended petitioner and recommended to the school board that she not be rehired, they had

II

This case starkly presents issues of individual constitutional rights that have, as the dissent below noted, "swirled nationwide for many years." *Id.*, at 453 (Edwards, J., dissenting). Petitioner did not lose her job because she disrupted the school environment or failed to perform her job. She was discharged merely because she is bisexual and revealed this fact to acquaintances at her workplace. These facts are rendered completely unambiguous by the jury's findings. Yet after a jury and the trial court who heard and evaluated the evidence rendered verdicts for petitioner, the court below reversed based on a crabbed reading of our precedents and unexplained disregard of the jury and judge's factual findings. Because they are so patently erroneous, these manuevers suggest only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone? I respectfully dissent from the Court's decision not to give its plenary attention to this issue.

A

That petitioner was discharged for her nondisruptive mention of her sexual preferences raises a substantial claim under the First Amendment. "For at least 15 years, it has been settled that a State cannot condition public employment

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"treated [petitioner] differently than similarly situated employees, because she was homosexual/bisexual." 730 F. 2d, at 458–459 (Special Verdict V). The Court of Appeals also criticized the trial judge for "ignor[ing]" an additional finding that petitioner had not properly performed her job on one occasion when she had identified two homosexual students that she was counselling to her secretary. *Id.*, at 450; see *id.*, at 459 (Special Verdict V, question 9); 2 Rec. App. 96–99. Of course, because the jury had determined that the one incident of poor performance was not a motivating factor in the decision to fire petitioner, it was entirely correct for the trial judge not to consider the incident in entering judgment for petitioner. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977) (plaintiff must show that constitutionally protected conduct was "motivating factor" in hiring decision, and that school board would not have reached same decision absent that conduct).

on a basis that infringes the employee's constitutionally protected interest in freedom of expression." 461 U. S., at 142.[3] Nevertheless, *Connick* held that if "employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," disciplinary measures taken in response to such expression cannot be challenged under the First Amendment "absent the most unusual circumstances." *Id.*, at 146, 147. The court below ruled that *Connick* requires the conclusion that a bisexual public employee constitutionally may be dismissed for "talking about it." This conclusion does not result inevitably from *Connick*, and may be questioned on at least two grounds: first, because petitioner's speech did indeed "touch upon" a matter of public concern, see *id.*, at 149, and second, because speech even if characterized as private is entitled to constitutional protection when it does not in any way interfere with the employer's business.

Connick recognized that some issues are "inherently of public concern," citing "racial discrimination" as one example. *Id.*, at 148, n. 8. I think it impossible not to note that a similar public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate.[4] Speech that "touches upon" this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.

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[3] In *Pickering* v. *Board of Education*, 391 U. S. 563, 574 (1968), we unanimously held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." Our subsequent decisions demonstrate that decisions not to rehire nontenured public employees may be challenged under the *Pickering* First Amendment rationale. See, *e. g.*, *Mt. Healthy City Board of Ed.* v. *Doyle*, *supra*; *Perry* v. *Sindermann*, 408 U. S. 593 (1972).

[4] As the dissent below noted, once petitioner's bisexuality became known through her mention of it, "it [became] an important matter of public concern" in southern Ohio. 730 F. 2d, at 453.

Connick's reference to "matters of public concern" does not suggest a strict rule that an employee's first statement related to a volatile issue of public concern must go unprotected, simply because it is the first statement in the public debate. Such a rule would reduce public employees to second-class speakers, for they would be prohibited from speaking until and unless others first bring an issue to public attention. Cf. *Egger* v. *Phillips*, 710 F. 2d 292, 317 (CA7 1983) (en banc) ("[T]he unpopularity of the issue surely does not mean that a voice crying out in the wilderness is entitled to less protection than a voice with a large, receptive audience"). It is the *topic* of the speech at issue, and not whether a debate on that topic is yet ongoing, that *Connick* directed federal courts to examine.[5]

Moreover, even if petitioner's speech did not so obviously touch upon a matter of public concern, there remains a substantial constitutional question, reserved in *Connick*, whether it lies "totally beyond the protection of the First Amendment" given its nondisruptive character. See 461 U. S., at 147.[6] The recognized goal of the *Pickering-Connick* rationale is to seek a "balance" between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption. See *id.*, at 142, 154; *Pickering*, 391 U. S., at 568–569. As

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[5] Compare *Van Ooteghem* v. *Gray*, 654 F. 2d 304 (CA5 1981) (en banc) (*per curiam*) (termination of a public employee because he reveals homosexuality and intention to speak publicly on that topic "clearly" constitutes *Pickering* violation).

[6] Many courts have noted that the disruptive potential of speech remains a vital component of First Amendment analysis in any public employment context after *Connick*. See, *e. g.*, *Curl* v. *Reavis*, 740 F. 2d 1323, 1329, n. 5 (CA4 1984); *Agromayor* v. *Colberg*, 738 F. 2d 55, 61 (CA1 1984); *McBee* v. *Jim Hogg County, Texas*, 730 F. 2d 1009, 1017 (CA5 1984) (en banc); *Berry* v. *Bailey*, 726 F. 2d 670, 676 (CA11 1984); *McGee* v. *South Pemiscot School District*, 712 F. 2d 339, 342–343, n. 4 (CA8 1983); *Egger* v. *Phillips*, 710 F. 2d 292, 320 nn. 29, 30 (CA7 1983) (en banc); *McKinley* v. *City of Eloy*, 705 F. 2d 1110, 1115 (CA9 1983).

the jury below found, however, the latter interest simply is not implicated in this case. In such circumstances, *Connick* does not require that the former interest still receive no constitutional protection. *Connick*, and, indeed, all our precedents in this area, addressed discipline taken against employees for statements that arguably had some disruptive effect in the workplace. See, *e. g.*, 461 U. S., at 151 ("mini-insurrection"); *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 285 (1977) ("dramatic and perhaps abrasive incident"); *Pickering*, *supra*, at 569 ("critical statements"). This case, however, involves no critical statements, but rather an entirely harmless mention of a fact about petitioner that apparently triggered certain prejudices held by her supervisors. Cf. *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949). The Court carefully noted in *Connick* that it did "not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." 461 U. S., at 154. This case poses the open question whether nondisruptive speech ever can constitutionally serve as the basis for termination under the First Amendment.

B

Apart from the First Amendment, we have held that "[a] State cannot exclude a person from . . . any . . . occupation . . . for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238–239 (1957). And in applying the Equal Protection Clause, "we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler* v. *Doe*, 457 U. S. 202, 216–217 (1982) (footnote omitted); see also *id.*, at 245 (BURGER, C. J., dissenting) ("The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility"). Under this rubric, discrimination against

homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis.

First, homosexuals constitute a significant and insular minority of this country's population.[7] Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality." *Id.*, at 216, n. 14. State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.[8]

Second, discrimination based on sexual preference has been found by many courts to infringe various fundamental constitutional rights, such as the rights to privacy or freedom of expression.[9] Infringement of such rights found to be "ex-

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[7] Judge Edwards' dissent cited evidence indicating that homosexuals may constitute from 8–15% of the average population. 730 F. 2d, at 455–456 (citing Marmor, Homosexual Behavior: A Modern Reappraisal (1980)). He concluded that non-heterosexual preference, like minority race status, "evoke[s] deeply felt prejudices and fears on the part of many people." *Id.*, at 453.

[8] See, *e. g.*, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 723–724 (1982) (discrimination based on gender); *Trimble* v. *Gordon*, 430 U. S. 762, 767 (1977) (discrimination based on illegitimacy); *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967) (discrimination based on race); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944) (discrimination based on national origin); see also *Plyler* v. *Doe*, 457 U. S. 202, 218–223 (1982) (suggesting heightened scrutiny for discrimination against alien children).

[9] See, *e. g.*, *Gay Alliance of Students* v. *Matthews*, 544 F. 2d 162, 167 (CA4 1976) (refusal to allow homosexual student group equal access to state university facilities invalidated because infringement of First Amendment rights to expression and association not supported by any "substantial governmental interest"); *benShalom* v. *Secretary of the Army*, 489 F.

plicitly or implicitly guaranteed by the Constitution," *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 33–34 (1973), likewise requires the State to demonstrate some compelling interest to survive strict judicial scrutiny. *Plyler*, *supra*, at 217. I have previously noted that a multitude of our precedents supports the view that public employees maintain, no less than all other citizens, a fundamental constitutional right to make "private choices involving family life and personal autonomy." *Whisenhunt* v. *Spradlin*, 464 U. S. 965, 971 (1983) (BRENNAN, J., dissenting from denial of certiorari). Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed, and which have left the lower courts in some disarray. See n. 9, *supra*; cf. *Carey* v. *Population Services International*, 431 U. S. 678, 688, n. 5, 694, n. 17 (1977).[10]

Supp. 964, 969, 973–977 (ED Wis. 1980) (regulation requiring discharge based on homosexual "tendencies, desire, or interest, but . . . without overt homosexual acts" held unconstitutional as violative of First and Ninth Amendment rights and right to privacy); *New York* v. *Onfore*, 51 N. Y.2d 476, 487–488, 492, n. 6, 415 N. E. 2d 936, 940, 942, n. 6 (1980), cert. denied, 451 U. S. 987 (1981) (criminal statute prohibiting private homosexual conduct found to infringe constitutional rights to privacy and equal protection under "compelling state interest" test). See also *Rich* v. *Secretary of the Army*, 735 F. 2d 1220, 1227, n. 7, 1228–1229 (CA10 1984) (noting "significant split of authority as to whether some private consensual homosexual behavior may have constitutional protection" but finding military's "compelling interest" in regulating homosexual conduct sufficient to uphold discharge based on false denial of homosexuality); *Beller* v. *Middendorf*, 632 F. 2d 788, 809–810 (CA9 1980) (same), cert. denied *sub nom. Beller* v. *Lehman*, 452 U. S. 905 (1981); but see *Dronenburg* v. *Zech*, —— U. S. App. D. C. ——, —— – ——, 741 F. 2d 1388, 1395–1398 (1984) (naval discharge for homosexual conduct upheld as "rationally related" to permissible goals of the military; no constitutional right of privacy implicated). See generally Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 682–686 (1980); Symposium: Sexual Preference and Gender Identity, 30 Hastings L. J. 799–1181 (1979).

[10] In this case, the school district has not even attempted to posit some legitimate interest that was advanced by terminating petitioner for her

Finally, even if adverse state action based on homosexual *conduct* were held valid under application of traditional equal protection principles, such approval would not answer the question, posed here, whether the mere nondisruptive *expression* of homosexual preference can pass muster even under a minimal rationality standard as the basis for discharge from public employment. This record plainly demonstrates that petitioner did not proselytize regarding her bisexuality, but rather that it became known simply in the course of her normal workday conversations.[11] The school district agreed to submit the issue of disruption to the jury,

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nondisruptive mention of her sexual preference. The school district had a full and fair opportunity to persuade a jury that petitioner's bisexuality or her mention of it interfered with some aspect of school administration, but the jury found to the contrary.

[11] Petitioner's first mention of her bisexuality at school apparently came in response to friendly but repeated questions from her secretary as to why petitioner seemed in a particularly "good mood" one day. When petitioner eventually responded that she was in love with a woman, the secretary apparently was upset by the unexpected answer, and reported it to petitioner's principal. 2 Rec. App. 101–102. On another occasion, petitioner was confronted by an angry mother who wanted to know why petitioner was counselling her to accept her son's expressed homosexuality when such conduct was "against the Bible." Petitioner did not inform the mother of her own preferences, but did inform her vice-principal, because she was "uneasy" that if the mother complained her own "job would be at stake." *Id.*, at 105–107. Finally, petitioner mentioned her bisexuality to some of her fellow teachers, first simply in the course of her friendships with them and later to enlist their support when it became clear that she would be disciplined for her bisexuality. *Id.*, at 102–104, 113.

This evidence indicates that petitioner's "speech" perhaps is better evaluated as no more than a natural consequence of her sexual orientation, in the same way that co-workers generally know whom their fellow employees are dating or to whom they are married. Under this view, petitioner's First Amendment and equal protection claims may be seen to converge, because it is realistically impossible to separate her spoken statements from her status. The suggestion below that it was error not to separate the claims precisely for the jury's benefit, and reliance on that suggestion to avoid discussion of the merits of petitioner's claim, see 730 F. 2d, at 450, again simply exposes the Court of Appeals' reluctance to confront forthrightly the difficult issues posed by petitioner's case. The jury's role was

and the jury found that knowledge of petitioner's non-heterosexual status did not interfere with the school's operation "in any way." I have serious doubt in light of that finding whether the result below can be upheld under any standard of equal protection review.[12]

III

The issues in this case are clearly presented.[13] By reversing the jury's verdict, the Court of Appeals necessarily held

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to find the facts, which it did in detail. It is the court's proper role to analyze, not avoid, those facts in light of the applicable legal principles.

[12] Cf. *Gay Alliance of Students*, 544 F. 2d, at 166 (a statute criminalizing mere "status" of being homosexual would be unconstitutional) (dictum); *BenShalom*, 489 F. Supp., at 969, 973–977 (regulation requiring discharge based on homosexual "interest" without evidence of conduct held unconstitutional absent showing that soldier's "sexual preferences interfered with her abilities as a soldier or adversely affected other members of the Service").

[13] The Court of Appeals' argument that petitioner's claim should not be considered because there was no evidence in the record of how "similarly situated" heterosexual teachers were treated is mere makeweight. We have recognized that, "[a]s in any lawsuit," a discrimination plaintiff "may prove his case by direct or circumstantial evidence." *U. S. Postal Service Bd. of Govs.* v. *Aikens*, 460 U. S. 711, 714, n. 3 (1983). This record is replete with direct evidence that petitioner's superiors discriminated against her because of her sexual preference. A jury is entitled to make rational inferences and apply its common-sense knowledge of the world, which includes the knowledge that most teachers are openly heterosexual and yet go undisciplined for that sexual preference. The jury's finding to that effect is reflected in its Special Verdict V. See n. 2, *supra*. The Court of Appeals' substitution of its own evaluation of the evidence for that of the factfinder's, on this and other questions, see nn. 2, 10, 11, *supra*, is simply impermissible. See *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 109–110 (1959). This is especially so where, as here (see 1 Rec. App. 149–150), the defendant made no motion for a directed verdict prior to submission to the jury. See, *e. g.*, *Wells* v. *Hico Independent School Dist.*, 736 F. 2d 243, 249 (CA5 1984). As the dissent below lucidly explained:

"The jury clearly did not believe that the above actions would have been taken against [petitioner] if she had not admitted a sexual preference which [the school superintendent, principal] and, ultimately, the School Board

that adverse state action taken against a public employee based solely on his or her expressed sexual preference is constitutional. Nothing in our precedents requires that result; indeed, we have never addressed the topic. Because petitioner's case raises serious and unsettled constitutional questions relating to this issue of national importance, an issue that cannot any longer be ignored, I respectfully dissent from the decision to deny this petition for a writ of certiorari.[14]

JUSTICE POWELL took no part in the consideration or decision of this petition.

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disapproved of. The question was one of credibility and logical inference which the jury was uniquely positioned to resolve." 730 F. 2d, at 454.

"The District Court based its judgment against the school district for petitioner's damages on two factual findings. First, the court found that the school board itself had violated petitioner's rights by acting not to renew her contract for the same impermissible reasons that had motivated the administrators' actions. Second, although the court ruled that the school administrators had taken their actions against petitioner in good faith, it found that the superintendent had acted as "a policymaker or decisionmaker" for the school district. 1 Rec. App. 106. See *Owen* v. *City of Independence*, 445 U. S. 622, 656 (1980). The Court of Appeals, however, concluded that petitioner could not recover her damages from the school district. In light of the trial judge's factual findings on this point, the latter decision was so clearly erroneous that I would reverse the decision as to liability without argument and limit oral argument to the *Connick* and equal protection questions discussed above.